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No. 03-

IN THE

Supreme Court of the United States

KALAMA SERVICES, INC. and ACE U.S.A. INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, and MICHAEL ILASZCAT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case concerning the imposition of Defense Base Act liability on private government contractors for actions prohibited by the United States military command and unrelated to the contractor's employment functions the Ninth Circuit circumvented this Court's judicially created "zone of special danger" doctrine to impose absolute liability.

The number of American civilians and private contractors subject to the Act is increasing exponentially as the privatization of U.S. military functions expands in response to terrorism and nation building obligations. As such private contractor involvement in all areas of our national defense, including deployment with front line troops and construction of public works projects in areas of active combat, continues, the U.S. military's supervision over the private workforce and imposition of the military's standard of conduct has become a regular aspect of the contractual relationship determining the rights and responsibilities of the contractors and their employees. The Ninth Circuit's circumvention of the "zone of special danger" doctrine rejects these considerations.

The questions presented, therefore, are:

1. Does this Court's judicially created "zone of special danger" doctrine, which identifies the parameters of circumstantial events and employee actions imposing Defense Base Act liability on private government contractors employed overseas on national security, defense and public work projects, allow for the imposition of absolute liability when the employee is injured while off duty, in a social

club, and engaged in personal frolicsome behavior of no benefit to the employer in a setting presenting no dangers of a unique nature?

2. Does the "zone of special danger" doctrine allow for the imposition of Defense Base Act liability in circumstances wherein the employee was injured while knowingly and voluntarily participating in conduct which was expressly prohibited by the U.S. military base commander and which resulted in a military order permanently barring the employee from the locale and from further private government contract work.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Kalama Services, Inc. is a joint venture of parent company HNSI Serco BRSC. No publicly held company owns 10% or more of the petitioner's stock.

Petitioner ACE U.S.A., Inc. is the successor in interest to Cigna Property and Casualty Insurance Company's worker's compensation and employer's liability insurance business. There is no parent corporation nor publicly held company which owns 10% or more of the petitioner's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-14a) is published at 354 F.3d 1085 (9th Cir. 2004). The Decision and Order of the Benefits Review Board dated June 19, 2002 (15a -30a) is published at 36 BRBS 78 (2002). The Decision and Order Awarding Benefits dated June 13, 2001 (31a-53a) is published at 35 BRBS 627 (ALJ) (2001).

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on January 15, 2004. (App. 1a). This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 33 United States Code, Section 902(2).

DEFINITIONS

When used in this Act—

. . .

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

The pertinent statutes involved are the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA") and the Defense Base Act, 42 U.S.C. §§ 1651, *et seq.* ("DBA").

STATEMENT OF THE CASE

This case presents to this Court the opportunity to delineate the limits of the "zone of special danger" doctrine, which Justice Frankfurter first elucidated as the controlling boundaries of applicability of the Defense Base Act ("DBA"), to situational events involving private contractors employed by the United States overseas to accomplish its public, military and national defense interests. The doctrine asserts that in determining whether a particular injury is "arising out of and in the course of employment", as statutorily mandated, "all that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504,507 (1951). The doctrine did not read the "job-connected" requirement of coverage out of the statute to be replaced by a "but for" relationship, see Justice Harlan's dissent in *O'Keefe v. Smith Associates,* 380 U.S. 359, 369 (1965), and was intended by Justice Frankfurter to exclude from the coverage of the DBA "the kind of conduct that employees engage in as frolics of their own". *O'Leary,* at 507.

In this case the Ninth Circuit has circumvented the doctrine so as to impose absolute liability under the DBA upon the employer for any and all types of injuries, no matter how caused, as long as they occur at distant, isolated locations, even if as a consequence of an employee's

frolicsome actions specifically prohibited by the U.S. military commander and sufficiently serious in nature as to result in the employee's compulsory debarment from the location.

STATEMENT OF FACTS

Michael Ilaszczat (the "employee") was employed by Kalama on the Johnston Atoll as the manager of its self-help store from August, 1996 until August 5, 1999. His employment was pursuant to and in furtherance of Kalama's contract with the United States Navy, in support of the DET 1-15th Air Base Wing, which obligated Kalama to provide a plethora of support services on the Johnston Atoll including operation and maintenance of the power and water desalination plants, building maintenance, landscaping, refuse collection, housing and food services, laundry and operation of the recreational facilities. (ACE is the DBA insurance carrier for Kalama). The Johnston Atoll is a two mile wide by one-half mile long island in the central Pacific approximately 700 miles south-west of Hawaii, which was used for over four decades until late 2000 by the United States military as a base to test, store and dispose of extremely dangerous and toxic weaponry including nuclear and chemical materials.

Given the unique and dangerous military operations taking place on the Atoll the military base commander maintained complete and final authority as the arbiter of the standards of conduct imposed on military and civilian personnel. Under threat of automatic debarment and permanent expulsion from the Atoll, and with it the employee's working under the Kalama/U.S.Navy contract, gambling and involvement in physical altercations were strictly prohibited.

In December of 1996, while in the course of performing his work duties, the employee injured his left leg. As a compensable claim under the DBA Kalama provided all statutory compensation and medical benefits, including the providing of a total left knee replacement in December, 1998. Thereafter, on July 25,1999, the employee injured his left hip while on the Johnston Atoll although not in the course of performing his work duties but, rather, while engaged in the prohibited activities of gambling and involvement in physical altercation at an after hours social club. It is the circumstances of this event which present to the court the issue of whether the employee suffered an injury "arising out of and in the course of employment" so as to impose liability under the DBA on Kalama.

Prior to trial before the Administrative Law Judge the employee and Kalama stipulated to the employee's medical status and his economic loss should it be found that the employee's injury is compensable. At trial the Administrative Law Judge found compensability and, further, accepted Kalama's application for Second Injury Fund relief relative to its continuing compensation obligations, in accord with Section 8(f) of the LHWCA, 33 U.S.C. § 908(f), as incorporated into the DBA. Isolated as the sole issue for review, therefore, is the coverage of the employee's injury via the applicability of the "zone of special danger" doctrine.

Conflicting accounts of what specifically transpired to cause the employee's left hip injury were provided by the three participants to the event, i.e., the employee and the two military policemen. While the employee stated that he injured his hip when he was caused to fall to the ground by MP Burum's kicking or "sweeping out" of his leg and MPs Burum and Sanchez testified that the employee was

injured when he charged at the two of them and slipped, falling to the ground, the facts pertinent to the "zone of special danger" analysis are undisputed.

The employee was injured in the early morning hours of July 25, 1999 at the AMVETS social hall on the Johnston Atoll while off duty and after a night of drinking and socializing. The critical events leading to the employee's fall to the ground and left hip injury include the employee's approaching two military policemen, also off duty and socializing, for purposes of challenging them to a game of pool for money, i.e., $10 a ball or $10 a game. After the MP's rebuffed the gamble the employee returned to them in approximately fifteen minutes with another betting challenge, this time a test of physical prowess and altercation. For this challenge the employee bet the MP's $100. The employee admitted at trial that he was well aware that both gambling and involvement in physical challenges were prohibited by the military base commander and that a violation of these prohibitions would result in a debarment order which would permanently remove him from the Johnston Atoll. Nevertheless, the employee did gamble and engage himself in the physical challenge, which resulted in his hip injury.

Colonel Thomas, the Installation Commander and Senior Military Officer on the Johnston Atoll, in accord with his command duties, did several days after the event issue a Debarment Order permanently removing the employee from the Atoll and forever preventing his return. That the employee was well aware that his actions with the MPs were strictly prohibited and that his violations of these prohibitions could result in his debarment from the Johnston Atoll and, consequently, his loss of employment with Kalama, was acknowledged by the employee at the trial when he admitted

lying to the police officer contemporaneously investigating the cause of his injury at the AMVETS. The employee testified that he lied to Patrolman Smith, stating that he had fallen while walking back to his table after a game of pool, because he knew that involvement in a physical altercation would result in his removal from the atoll.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT THE ZONE OF SPECIAL DANGER DOCTRINE DOES NOT IMPOSE ABSOLUTE LIABILITY UPON THE EMPLOYER

The Defense Base Act, 42 U.S.C. §§ 1651, *et seq.* (DBA), extends the provisions of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA), to, among a specified category of cases, injury or death of an employee engaged in employment under a "public work" or service contract with the United States Government or any branch, department or agency thereof. 42 U.S.C. § 1651(a). The DBA was originally enacted to cover civilians employed at overseas military bases and has been expanded to include civilians working overseas in government sponsored construction projects, service projects, or national defense activity. *University of Rochester v. Hartman*, 168 F.2d 170, 176 (2d Cir. 1980).

Similar to claims under the LHWCA, the claimant in a DBA matter bears the burden of proving that the alleged injury arose in the course of employment. *See Director, OWCP v. Greewich Collieries*, 512 U.S. 267 (1994). However, under the DBA, the course of employment standard has been expanded by the "zone of special danger" doctrine

which was first enunciated in 1951 by Justice Frankfurter in the matter of *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951).

In *O'Leary*, the Court found that the death of an employee who drowned while attempting to rescue an unknown man from a waterway while returning from an employer provided recreation center arose within a "zone of special danger" associated with his employment in the foreign locale. In so ruling, the Court reversed the finding by the Circuit Court that the incident did not arise out of and in the course of employment under Section 2(2) of the LHWCA, 33 U.S.C.§ 902(2). Justice Frankfurter wrote that the Circuit Court's interpretation of the Act was "too restricted" finding that:

> The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident. *Thom v. Sinclair*, [1917] A.C. 127, 141. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment created the "zone of special danger" out of which the injury arose. *Ibid. O'Leary*, 340 U.S. at 506-507.

Of importance to this matter, in creating the zone of special danger doctrine the Court did not provide a 24 hour per day 7 day per week basis for including any and all activity of an employee as within the course of employment. In that

regard, the Court in *O'Leary* established limits to the zone of special danger doctrine stating:

> This is not to say that there are not cases "where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *Matter of Waters v. Taylor Co.*, 218 N.Y. at 252, 112 N.E. at 728. We hold only that rescue attempts such as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in *as frolics of their own*. *O'Leary*, 340 U.S. at 507 (Emphasis supplied).

The dissent in *O'Leary* also recognized that the Court intended for the "zone of special danger" doctrine to have limits. Along these lines, the dissent agreed that Justice Frankfurter's majority opinion "would seem to indicate that we are leaving some place for voluntary acts of the employees outside the course of their employment for which the employer may not be liable." *O'Leary*, 340 U.S. at 510 (Justice Minton dissenting).

The Court next addressed the "zone of special danger" doctrine some 14 years later in a per curium decision in the matter of *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 330 U.S. 359 (1965). In *O'Keefe*, the Court found that the death of an employee who drowned during an off site recreational boating trip arose in the zone of special danger associated with working in South Korea on a 365 day basis

subject to the employer's call at any time. As the District Court noted "it was reasonable to conclude that recreational activities contributed to a higher efficiency of the employer's work and that when conducted in the restricted area of employment, on a work day, so to speak, and in a manner *not prohibited* by the employer, such activity was an incident of employment." *O'Keefe*, 380 U.S. at 364 (quoting, District Court slip opinion, 222 F. Supp. 4, 19) (Emphasis supplied).

However, the dissent made clear that the "zone of special danger" doctrine did not impose absolute liability upon the employer. The statutory intent could only be followed where compensation was provided for "all job-connected injuries on the actual job site and, additionally, those injuries off the job site which result from the 'special' dangers of the employment." *O'Keefe*, 380 U.S. at 370 (Justice Harlan dissenting).

In matters involving the "zone of special danger" doctrine during the nearly 55 years since *O'Leary* and 40 years since *O'Keefe* there has yet to be a Circuit Court opinion which has recognized the limits of the doctrine. To the contrary, as this matter exemplifies, courts have readily imposed absolute liability upon the Defense Base Act employer.

In this case the employee was injured off duty while drinking and socializing at a local bar. The left hip injury he suffered was as a direct consequence of his engaging in conduct expressly prohibited by the United States military command, i.e., gambling and involvement in a physical altercation. The employee's actions were frolicsome in nature, of the kind referenced by Justice Frankfurter when the limitations of the "zone of special danger" were announced.

II. CERTIORARI SHOULD BE GRANTED IN ORDER FOR THIS COURT TO IDENTIFY THE PARAMETERS OF THE ZONE OF SPECIAL DANGER DOCTRINE IN THE CIRCUMSTANCE WHEREIN THE U.S. MILITARY COMMANDER SETS THE RULES OF CONDUCT AND ACTION FOR CIVILIAN CONTRACTORS AND THEIR EMPLOYEES.

The Ninth Circuit wholly failed to consider the impact on the employer's Defense Base Act liability under the circumstances presented by this case wherein the cause of the employee's injury directly resulted from his violation of the prohibitions on conduct which the U.S. military base commander had imposed under standing order. In order to effectuate the military purposes of his command of the Johnston Atoll and to enable private governmental contractors to accomplish their support obligations the commander had made gambling and the involvement in physical altercation expressly stated prohibited activities, the violation of which would result in the issuance of a debarment order permanently removing the offending employee from the atoll, as well as from his employment with the contractor. These rules of conduct were critical to all operations on the Johnston Atoll and formed the parameters for work and social activity by its residents. The employee in this case admitted his knowledge of these rules, as well as his knowing and voluntary violation of them.

This court in its *O'Keefe* discussion, 380 U.S. at 364, has acknowledged that it is of relevance in determining the parameters of an employer's Defense Base Act liability under the "zone of special danger" doctrine whether the conduct

and activity occurring at the time of injury is prohibited or not. Nevertheless, the Ninth Circuit excluded this critical factor from its consideration.

That court's disregard and its circumvention of the "zone of special danger" doctrine is of compelling concern. As noted, the increasing privatization of United States military, security, defense and public works functions in combat and harm's way overseas locations has demanded the increasing control of civilian governmental contractors by military command orders. These orders directly manage the contactor's employees actions and conduct and are relevant to a determination of and employer's Defense Base Act liability. This Court's direction is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUBMITTED DECEMBER 2, 2003 AND FILED JANUARY 15, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-72578

OWCP Nos. 15-43737, 2000-LHC-01877, 01-0774

KALAMA SERVICES, INC;
CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

On Petition for Review of an Order of the Benefits Review Board

Submitted December 2, 2003*
San Francisco, California

Filed January 15, 2004

Before: A. Wallace Tashima, Sidney R. Thomas, and Barry G. Silverman, Circuit Judges.

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* The panel unanimously finds this case suitable for disposition without oral argument. *See* Fed. R.App. P. 34(a)(2)(C).

Appendix A

OPINION

SILVERMAN, Circuit Judge:

We hold today that the Benefits Review Board did not err in ruling that injuries suffered by an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a "zone of special danger" created by the isolation of the island and the limited recreational opportunities available there.

Facts and Procedural History

Johnston Atoll is a United States possession, located about 700 miles west-southwest of Hawaii in the Pacific Ocean.[1] It is only two miles long and one-half mile wide. The United States military uses the atoll to store and dispose of chemical, nuclear, and other toxic weapons. Certain standards govern the conduct of inhabitants at all times during their stay on the atoll. For example, gambling and fighting are prohibited.

The United States government contracted with Kalama to provide operational and maintenance services on the atoll. In August 1996, Kalama hired Michael Ilaszczat to manage the Self Help Store on the atoll. The Self-Help Store serves local residents with materials and tools for projects. In December 1996, Ilaszczat injured his left leg in a work-related accident. As a result of this injury, Ilaszczat had a total left knee replacement in December 1998.

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1. For a history of Johnston Atoll, see *Farrell v. United States*, 313 F.3d 1214, 1216-18 (9th Cir.2002).

Appendix A

On July 25, 1999, Ilaszczat injured his left hip. The hip injury is the subject of the instant claim. At about 9:30 p.m. on July 24, 1999, after completing his work for the day, Ilaszczat went to the Tiki Bar, which is one of several authorized social clubs on Johnston Atoll. At the Tiki Bar, Ilaszczat consumed two mixed drinks and played pool. He stayed at the Tiki Bar until it closed at about 12:30 a.m. on July 25. Ilaszczat then went to the AMVETS, another social club on the atoll, where he had two more mixed drinks.

There are conflicting accounts of precisely what transpired at the AMVETS, but it is undisputed that Ilaszczat fell and injured his hip there. According to Ilaszczat, he approached a group of soldiers and bought them drinks. These soldiers included Private Clyde Burum and Private Benjamin Sanchez. Ilaszczat offered to play the soldiers a game of pool for $10 per game or $10 per ball, but none of the soldiers was interested. Ilaszczat then left the soldiers and played a game of pool by himself.

Ilaszczat returned shortly thereafter. He described his second encounter with the soldiers as follows:

> [T]here was a couple of the military guys sitting at the bar and somehow the subject got around to martial arts. . . . [Burum] said he was really good at it and I said, "Well, you can't be that good at it, you know, because your hand's all screwed up." I found out later he put it through a window. . . . [H]e said that he could take his leg and put it over my head without touching me. . . . I said, "That's impossible. . . . I'm almost six foot tall."

> . . . [H]e says, "No, I can do that." I says, "Look, I'm not into that kind of crap." . . . I took my card out and I showed him my card where I got the artificial knee and I rolled up my pants to show him the scar on my other leg and he says, "No, I can do it without touching you." . . . [H]e was pretty insistent upon showing me how he could lift my [sic] leg over my head without touching me. . . . So, I went to the back of the room where the pool table and that picnic table [were] and I put my drink down on the picnic table and when he went to kick me, his foot only came up to here and I blocked it and I turned around and I said, "No, that's it. Bullshit." . . . And I picked up my drink to walk away and the next thing I know I was on the ground and my hip was broken.

Ilaszczat initially testified he had no interest in participating in the demonstration, but he later conceded he had bet Burum $100 that Burum could not put his leg over Ilaszczat's head without touching him. In describing how he had fallen to the floor, Ilaszczat testified that Burum may have "swept" his foot out from under him, or kicked him.

Burum and Sanchez offered a different account. They testified that Ilaszczat bragged he was too fast for anyone to knock him to the ground or kick him in the knee, even with his total left knee replacement. They claim that Ilaszczat sustained his injury when he "charged" at Burum immediately after the demonstration, lost his balance, and then fell to the ground. The ALJ found Ilaszczat's account to be more credible than that of Burum and Sanchez.

After the demonstration, paramedics and a police officer arrived on the scene.[2] Ilaszczat was taken to the Kalama Services Clinic, where he remained for two days, and was subsequently transferred to Hawaii for hip surgery. While recovering from surgery, Ilaszczat received a debarment order from the Johnston Atoll military commander. The order barred Ilaszczat from the island and prohibited him from ever returning as a result of the "physical altercation" that took place on July 25, 1999. Kalama terminated Ilaszczat's employment based on the debarment order. Ilaszczat moved to Honolulu, Hawaii.

Ilaszczat filed a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("LHWCA"), as extended by the Defense Base Act ("DBA"), 42 U.S.C. §§ 1651 *et seq.* His claim proceeded to trial before an ALJ in Honolulu. At trial, Ilaszczat and Kalama stipulated, among other things, that Ilaszczat: (i) was temporarily totally disabled from July 25, 1999, to January 1, 2000; (ii) attained maximum medical improvement on January 1, 2000; and (iii) has been permanently partially disabled since January 1, 2000.

The ALJ found that Ilaszczat had established a sufficient causal relationship between his injury and his employment, and awarded him disability benefits. Kalama appealed to the Benefits Review Board, which affirmed the ALJ's decision.

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2. Ilaszczat told the police officer he had just finished playing pool and was walking back to his chair when his knee gave out and he fell down. Ilaszczat admitted he had lied to the police officer because he did not want to be accused of having engaged in an "altercation," which constitutes grounds for expulsion from Johnston Atoll.

Kalama subsequently filed a timely petition for review in this court. We have jurisdiction under 33 U.S.C. § 921(c). *See Edwards v. Dir., Office of Workers' Comp. Programs*, 999 F.2d 1374, 1375 (9th Cir.1993).

Standards of Review

We review BRB decisions for errors of law and for adherence to the substantial evidence standard, which governs the Board's review of an ALJ's factual determinations. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159 (9th Cir.2002). The BRB "may not substitute its views for those of the administrative law judge or engage in a *de novo* review of the evidence." *Stevens v. Dir., Office of Workers' Comp. Programs*, 909 F.2d 1256, 1257 (9th Cir.1990). Rather, the Board must accept the ALJ's findings of fact "unless they are contrary to the law, irrational, or unsupported by substantial evidence." *Sestich*, 289 F.3d at 1159.

Discussion

Congress passed the Defense Base Act in order to provide workers' compensation coverage for certain classes of employees working outside the continental United States. *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 765 (9th Cir.1979). Rather than draft a new workers' compensation scheme, Congress used the DBA to extend the LHWCA to apply to the newly-covered workers. *Id.* The parties agree that the LHWCA, as extended by the DBA, applies in this case.

We apply the following burden-shifting proof scheme in LHWCA cases. The claimant bears the initial burden of

showing that a work-related injury prevents him from performing his former job. *See Edwards*, 999 F.2d at 1375. If the claimant makes this showing, the burden shifts to the employer to demonstrate that suitable alternative employment is available to the claimant. *See id.* An employer may satisfy this burden in two ways. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 800 (4th Cir.1999). The employer itself may make suitable alternative employment available to the injured employee. *See id.* Alternatively, the employer may show that suitable alternative employment is available to the injured worker in the "relevant labor market." *See id.* If the employer satisfies this burden, the claimant may rebut the employer's evidence of suitable alternative employment with evidence showing a diligent but unsuccessful search for such employment. *See Edwards*, 999 F.2d at 1376, n.2. If the employer does not satisfy its burden of showing available alternative employment, it must pay the claimant disability benefits. *Id.* at 1375.

In this case, Kalama does not dispute that Ilaszczat satisfied the burden of demonstrating that his injury prevented him from performing his former job. Thus, the burden shifted to Kalama to establish that suitable alternative employment was available to Ilaszczat, either within Kalama or in the "relevant labor market." However, Kalama contends that because Ilaszczat's own misconduct caused him to be barred from Johnston Atoll, it should be excused from having to make any showing of available alternative employment.

With these principles in mind, we now turn to Kalama's challenge to the BRB's decision.

Appendix A

I. "Zone of Special Danger"

Kalama first argues that Ilaszczat is not entitled to disability benefits under the Longshore and Harbor Workers' Compensation Act because his injury was not related to his employment. To establish entitlement to benefits, a LHWCA claimant bears the burden of proving that his injury "[arose] out of and in the course of [his] employment." 33 U.S.C. § 902(2); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). This standard "is not confined by common law conceptions of scope of employment." *O'Leary v. Brown-Pacific-Mason*, 340 U.S. 504, 506 (1951). For example, an employee need not establish a causal relationship between his employment and the accident that occasioned his injury. *Id.* at 506-07. "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." *Id.* at 507. Rather, "all that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." *Id.*

In *O'Leary*, an employee working in Guam spent an afternoon at his employer's recreational center, which was adjacent to a dangerous river channel in which swimming was prohibited. 340 U.S. at 505. After observing two men near the channel signal for help, the employee jumped into the channel to attempt to rescue an unknown man, but drowned during the rescue attempt. *Id.* The employee's dependent mother filed a claim for death benefits with the appropriate bureau in the U.S. Department of Labor (the "agency"). *Id.* The agency granted her claim. *Id.* at 506. The Supreme Court affirmed the agency's finding that

the employee had acted reasonably in attempting the rescue and that his death could be attributed to the risks of his employment. *Id.* at 508. The Court also noted that a reasonable rescue attempt was "an incident of the service, foreseeable, if not foreseen" and therefore arose out of the "zone of special danger" created by the conditions of the employee's job. *Id.* at 507.

Courts applying *O'Leary* have held that injuries resulting from reasonable and foreseeable recreational activities in isolated or dangerous locales arise out of a "zone of special danger" and are therefore compensable under the LHWCA. *See, e.g., O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359, 363-64 (1965) (employee drowned in a weekend boating accident 30 miles from his job site at a defense base in South Korea); *Self v. Hanson*, 305 F.2d 699, 702-03 (9th Cir.1962) (employee was injured during a late-night rendezvous with her supervisor in a parked car that was hit by an out-of-control army weapons carrier in Guam); *Takara v. Hanson*, 369 F.2d 392 (9th Cir.1966) (employee was hit by a truck while hitchhiking back to his campsite after dinner at a local restaurant in Guam); *Pan Am. World Airways, Inc. v. O'Hearne*, 335 F.2d 70, 70-71 (4th Cir.1964) (death of employee in an after-hours jeep accident in the Bahamas arose out of the "zone of special danger" even though the jeep may have been speeding and the employer may not have authorized the use of its jeep); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27, (1965) (same).

By contrast, injuries resulting from recreational activities that are neither reasonable nor foreseeable generally fall outside the "zone of special danger." *See, e.g., O'Keeffe,*

380 U.S. at 362 (noting that *O'Leary* "drew the line only at cases where an employee has become 'so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment' ") (quoting *O'Leary*, 340 U.S. at 507). For example, in *Kirkland v. Air America, Inc.*, 23 BRBS 348, 349 (1990), an employee was murdered during a burglary of his home. The employee's wife was implicated in the crime by the two men who confessed, one of whom was believed to be her boyfriend. *Id.* at 349, 351-52. The ALJ denied the widow's claim for benefits and the BRB affirmed, concluding, among other things, that her participation in the murder of her husband "effectively severed any causal relationship which may have existed between the conditions created by his job and his death." *Id.* at 349-50; *see also Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988) (no nexus between the conditions of an employee's job and his death by autoerotic asphyxiation).

In this case, the ALJ concluded that Ilaszczat established a sufficient nexus between his injury and his employment under the "zone of special danger" doctrine. The ALJ found that employees residing on Johnston Atoll have limited recreational opportunities and that the military expressly authorizes social clubs on the island. The ALJ also found that the presence of social clubs serving alcohol to employees who experience lengthy periods of isolation on the atoll creates a foreseeable risk that horseplay might take place from time to time. The ALJ noted that Ilaszczat was injured during a brief "one-sided" scuffle, in which Burum was the aggressor. In addition, Ilaszczat participated in the demonstration believing he would not be hurt, either because Burum would

accomplish what he had promised or because Ilaszczat would block the kick.[3] On appeal, the BRB concluded that the ALJ properly applied the "zone of special danger" doctrine.

We conclude that the BRB committed no error of law and properly held that the ALJ's factual findings were supported by substantial evidence. Of particular note is the fact that Johnston Atoll is a small, remote island—only two miles long and one-half mile wide—which offers residents few recreational opportunities. We agree that, under these circumstances, horseplay of the type that occurred here is a foreseeable incident of one's employment on the atoll. *Accord*, *O'Keeffe*, 380 U.S. at 363 (recognizing that the decedent "had to seek recreation under exacting and unconventional conditions" in South Korea); *O'Hearne*, 335 F.2d at 71 ("[c]onsidering the distant place of employment, the sparsity of population and limited area of the island, . . . the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat"); *Self*, 305 F.2d at 702 (noting that employees reasonably sought recreation at the location where claimant was injured because "[e]mployees were restricted to a most limited portion of the island [of Guam] which itself provided narrow limits of confinement"). We, like the BRB, conclude that the ALJ's decision was not irrational, contrary to law, or without substantial evidence in the record.

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3. The ALJ observed that Ilaszczat had consumed several alcoholic drinks that night. The LHWCA precludes compensation for injuries "occasioned solely by the intoxication of the employee." 33 U.S.C. § 903(c). Kalama conceded at trial that the evidence did not support a finding that Ilaszczat's injury was occasioned solely by his intoxication.

Appendix A

II. Employee Misconduct

Kalama next argues that Ilaszczat's misconduct and breach of company rules provide an independent basis for denying him disability benefits. Employee misconduct is, in general, not material in compensation law, unless it "takes the form of deviation from the course of employment." 2 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 32.00 (2000). Kalama argues that Ilaszczat's conduct in this case was a "deviation" from the course of his employment. In support of this argument, Kalama relies principally on the Board's decision in *Brooks v. Newport News Shipbuilding and Dry Dock Co.*, 26 BRBS 1 (1992).

In *Brooks*, the claimant injured his lower back while working as a joiner. *Id.* at 2. When he returned to work three days later, the claimant reported his injury to a physician at his employer's clinic and advised the physician that he had injured his back several years earlier. *Id.* The claimant worked intermittently for another three months, after which his employer assigned him lighter work issuing tools. *Id.* Two months later, the employer discharged the claimant on the ground that he had violated the labor contract by failing to disclose his previous back injuries in the employment application. *Id.* The claimant filed a claim for disability benefits seeking, among other things, compensation for several periods of time after the date of his discharge. *Id.* at 2-3.

The employer in *Brooks* argued that the claimant was not entitled to any compensation after the date of his discharge because he lost his job as a result of his own misconduct, not as a result of his injury. *Id.* at 5. The BRB agreed:

Appendix A

> Because claimant's inability to perform the postinjury job at employer's facility on or after [the date of discharge] was due to his own misfeasance in violating a company rule, any loss in his wage-earning capacity thereafter is not compensable under the [LHWCA] inasmuch as it was not due to claimant's disability resulting from the work-related incident. Moreover, since claimant was discharged for reasons unrelated to his disability, employer did not have a continuing responsibility to identify new suitable alternate employment, as employer is not a long-term guarantor of claimant's employment.

Id. at 6 (citations omitted).

Kalama argues that Ilaszczat's claim is barred because, like the claimant in *Brooks*, Ilaszczat was discharged as a result of his misconduct. *Brooks*, however, does not establish a rule barring all disability benefits in cases where a claimant is discharged for misconduct. Rather, *Brooks* stands for the much narrower proposition that a claimant's post-injury job, from which he was *later* fired for cause, may satisfy an employer's burden of showing suitable alternative employment. *See, e.g., Brooks v. Dir., Office of Workers' Comp. Programs*, 2 F.3d 64, 65 (4th Cir.1993) (employer satisfied its burden of showing suitable alternative employment where a suitable alternative job within the company became unavailable to the employee because of his termination); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 43 n.4 (1996) (*Brooks* establishes that a termination for reasons unrelated to a claimant's disability "does not preclude

consideration of the job as suitable alternate employment[;]" *Brooks* does "not exempt [an] employer from meeting the normal tests for establishing suitable alternate employment").

Brooks is inapplicable here. The claimant in *Brooks* returned to work three days after his injury, worked intermittently for another three months, and was subsequently assigned lighter work at the same company for the next two months until he was discharged. *Brooks*, 26 BRBS at 2. By contrast, Ilaszczat *never* worked for Kalama again after he injured his hip. He was *not* performing suitable alternate employment at the time Kalama discharged him. Thus, *Brooks* simply does not apply. *Accord*, *Newport News Shipbuilding and Dry Dock Co. v. Riley*, 262 F.3d 227, 232 (4th Cir.2001) (*Brooks* did not apply because claimant was not performing suitable alternative employment within the company at the time she was terminated).

The BRB concluded that Kalama failed to satisfy its burden of demonstrating that suitable alternative employment was available to Ilaszczat. Kalama does not contest this conclusion in its petition for review. Instead, Kalama argues it should be excused from satisfying its burden because employees working under Defense Base Act contracts on Johnston Atoll ordinarily earn significantly higher wages than they would in non-DBA projects elsewhere. However, Kalama did not raise this argument before the BRB. Therefore, the argument is waived. *See Duncanson-Harrelson v. Dir., Office of Workers' Comp. Programs*, 644 F.2d 827, 831-32 (9th Cir.1981).

PETITION FOR REVIEW DENIED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD DATED JUNE 19, 2002

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 01-0774

MICHAEL ILASZCZAT

Claimant-Respondent

v.

KALAMA SERVICES

and

CIGNA PROPERTY AND CASUALTY

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: JUNE 19, 2002

DECISION and ORDER

Appendix B

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order — Awarding Benefits (2000-LHC-1877) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§ 901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant began working for employer in August 1996 as the manager of the "Self-Help Store" on the Johnston Atoll.[1] The "Self Help Store" served local residents, military and civilians with materials and tools for individualized projects on the island. Claimant initially sustained a work-related injury to his left leg in December 1996, which ultimately resulted in a total left knee replacement in December 1998. Claimant alleges that he also sustained an injury to his left hip on July 25, 1999, while engaging in a post-work recreational activity. At about 9:30 p.m., after completing

1. The Johnston Atoll is a two mile long by one-half mile wide island located in the South Pacific about 800 miles southwest of Hawaii. It served as a United States nuclear and chemical warfare waste storage facility until late 2000. Employer was a contractor of the United States military responsible for providing operating and maintenance services on Johnston Atoll.

his work on July 24, 1999, claimant went for drinks first at the Tiki Bar, where he remained until closing at about 12:30 a.m. on July 25, 1999, and then to the AMVETS. According to claimant, while at the AMVETS, he approached a group of soldiers, bought them drinks, and later allegedly entered into a wager with one of them, Military Police Officer Private First Class (PFC) Clyde Burum, wherein claimant bet PFC Burum $100 that he could not, in a karate demonstration, "put [his] leg over [claimant's] head without touching [claimant]." Hearing Transcript [HT] at 88-89, 103-104. Claimant stated that he set down his drink, that PFC Burum went to kick him, and that once he saw that there was no way that PFC Burum's foot was going over his head, he raised his left arm and blocked the kick. HT at 91. Claimant stated that he then picked up his drink to walk away and "the next thing I know I was on the ground and my hip was broken." HT at 86. In describing how he had fallen, claimant testified that PFC Burum may have "swept" his foot out from under him, or kicked him.[2] Claimant was immediately taken to the Kalama Services Clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. While recovering from surgery, claimant received notice from the base military commander, Colonel Jeffrey A. Thomas, that he was expelled from the atoll and was precluded from ever

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2. Claimant's version of the altercation which resulted in his injury significantly varies from those of PFC Burum and another soldier, PFC Sanchez. These soldiers described an altercation in which claimant wagered that even with his total left knee replacement, he was too fast for anyone to knock him to the ground or kick him in the knee and that claimant was injured when he charged at PFC Burum and fell to the ground. *See, e.g.*, Claimant's Exhibit 20, p. 18-19, 21-24; Claimant's Exhibit 18, p. 93-96, 99, 39-40.

returning.[3] HT at 107. Employer thereafter discharged claimant by notice dated August 5, 1999, based on the fact that the debarment order prohibited his return to the Johnston Atoll.

Claimant subsequently filed the instant claim. At the hearing, the parties entered into stipulations, and the administrative law judge thereafter issued a Decision and Order on February 9, 2001, based on those stipulations awarding claimant a 70 percent permanent partial disability scheduled award under Section 8(c)(2), 33 U.S.C. § 908(c)(2), for the work-related left knee injury which occurred in December 1996. However, with regard to the left hip injury sustained on July 25, 1999, employer asserted that claimant did not sustain a compensable injury, specifically arguing that this injury does not fall within the "zone of special danger" doctrine. Alternatively, employer averred that claimant is not entitled to permanent partial disability benefits as his alleged loss of wage-earning capacity was caused solely by his own misfeasance in violating the standards of conduct for employees on the Johnston Atoll which resulted in his inability to work for employer.

In his Decision dated June 13, 2001, the administrative law judge determined that claimant's injury is compensable under the Act, despite the fact that it did not occur while claimant was performing the duties of his employment, as a "zone of special danger" was created by the conditions of claimant's overseas job. In addition, the administrative law judge determined that claimant's conduct, although perhaps unauthorized and/or prohibited, was not so egregious as to sever the relationship

3. In particular, the order prohibits claimant from returning because of the events of July 25, 1999, and characterizes those events as an "altercation." Claimant's Exhibit 10, p.2.

between his employment and the injury under the "zone of special danger" doctrine. He therefore awarded, based on the parties' stipulations, temporary total disability benefits from July 25, 1999, until January 1, 2000, permanent partial disability benefits continuing from January 1, 2000, based on a loss of wage-earning capacity of $335.60 a week, and medical benefits. Lastly, the administrative law judge found that employer is entitled to Section 8(f) relief, 33 U.S.C. § 908(f).

On appeal, employer challenges the administrative law judge's finding that claimant sustained a compensable injury under the Act, and that he is entitled to permanent partial disability benefits. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in finding that claimant's conduct fell within the "zone of special danger" doctrine since the record clearly establishes that his actions at the time of injury were grossly unreasonable, in clear violation of the standards of conduct applicable to employees on the Johnston Atoll, and resulted in his debarment from the island. Employer further argues that the administrative law judge has completely ignored the legal "reasonable recreation" standard, wherein only those incidents in which the claimant's conduct was reasonable are accepted as falling within the "zone of special danger" doctrine.

Under the Defense Base Act, the United States Supreme Court has allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the employee, while spending the afternoon in the employer's recreational facility near the shoreline in Guam, drowned

while attempting to rescue two men in a dangerous channel. The Court stated that "[a]ll that is required [for compensability] is that the 'obligations or conditions' of employment create the 'zone of special danger out' of which the injury arose." *O'Leary*, 340 U.S. at 505. In *O'Keeffe*, 380 U.S. 359, the employee drowned in a lake in South Korea during a weekend outing away from the job. In awarding benefits, the Court noted that the employee had to work under "the exacting and unconventional conditions of Korea." *See also Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965) (awarding benefits where employee was killed in a car accident while on the way back from having a beer in town on San Salvador Island in the British West Indies).

The Board followed the Supreme Court's holdings in deciding *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978), when the employee died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal. The deceased had been employed as an educational advisor by Southern Illinois University, which in turn had a contract with the United States Government to provide educational assistance to the Nepalese government. The round of golf was shown not to have been employment-related, but the Board held that this fact was insufficient to deny the claim based on precedent extending coverage under the Defense Base Act to all employees subjected to the "zone of special danger,"[4] which it defined

4. In addition to the Supreme Court decisions in *O'Leary*, *O'Keeffe*, and *Gondeck*, several circuits have applied the "zone of special danger" doctrine to award benefits in cases arising under the Defense Base Act. *See, e.g., O'Keeffe v. Pan-American World*

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as the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant. The Board stated that this view of the Defense Base Act was necessary because those employees who come within its ambit are subjected to unusual risks, working as they often do in the farthest reaches of the globe. In *Harris v. England Air Force Base*, 23 BRBS 175 (1990),[5] the Board further explained that "this [zone of special danger] test was formulated in cases arising under the Defense Base Act and is well-suited to those cases since the conditions of employment place the employee in a foreign setting where he is exposed to dangerous conditions." *Harris*, 23 BRBS at 179. The Board also stated that in "these cases [arising under the Defense

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Airways, Inc., 338 F.2d 319 (5th Cir.), *cert. denied*, 380 U.S. 950 (1965) (awarding benefits where employee was killed in a motorcycle accident on Grand Turk Island in the British West Indies while driving on the wrong side of the road); *Pan-American World Airways, Inc. v. O'Hearne (Smith)*, 335 F.2d 70 (4th Cir. 1964) (awarding benefits where employee was killed in the same car crash as in *Gondeck*, 382 U.S. 25); *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962) (awarding benefits where employee was injured during a midnight rendezvous in a turn-around area at the seaward end of a breakwater on the island of Guam); *Hastorf-Nettles, Inc. v. Pillsbury*, 203 F.2d 641 (9th Cir. 1953) (awarding benefits where employee was injured in a car accident near Anchorage, Alaska, while on the way back to camp from a sightseeing trip on a scheduled day off).

5. In Harris, a case arising under the Nonappropriated Fund Instrumentalities Act, the Board held that the administrative law judge erred by relying on the "zone of special danger" doctrine, since application of that test is limited to claims arising under the Defense Base Act and cases arising under the District of Columbia Workmen's Compensation Act. *Harris*, 23 BRBS at 178-179.

Base Act] employer can be said to create a zone of special danger by employing the employee in a foreign country." *Id.* The Board, however, has also held in a Defense Base Act case that where no evidence of record supported a determination that the activity which occasioned the employee's death was related to conditions created by his overseas job, and where the circumstances surrounding the employee's death did not in themselves suggest that the death was work-related, the "zone of special danger" test was, as a matter of law, not met. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989)(employee who asphyxiated himself while engaged in a personal activity at an Air Force base in Germany did not fall within the zone of special danger).

In the instant case, the administrative law judge found that claimant and the other employees on the Johnston Atoll had limited choices and opportunities for recreation, and that this is, presumably, the reason why the military authorized the operation of "social clubs" on the atoll. The administrative law judge further found that with the existence of clubs serving alcohol to employees, in combination with the employees' lengthy periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and employer that "risky horseplay" or scuffles such as that which occurred on July 25, 1999, would occur from time to time. As such, he determined that claimant's conduct herein was not "so far from his employment" and was not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment." Decision and Order at 8, citing *O'Leary*, 340 U.S. at 507. The administrative law judge also found no evidence that claimant initiated the scuffle with PFC Burum, and held that it is apparent that he

was a "somewhat reluctant" participant in the incident. Decision and Order at 8. Moreover, the administrative law judge observed, based on the evidence, that claimant participated in the "demonstration" thinking that he would not get hurt because PFC Burum would either accomplish what he had promised or because claimant would be able to block the kick.

It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge observed in his decision, the record contains conflicting evidence regarding the events which culminated in claimant's injury on July 25, 1999. Nevertheless, the administrative law judge, after consideration of the entirety of this evidence, found claimant's version of the events to be more credible.[6] Thus, based on claimant's

6. In this regard, the administrative law judge acknowledged that claimant lied to the police officer at the scene about the events resulting in his injury, and that there was conflicting testimony from eyewitnesses regarding the exact terms of the wager, i.e., whether claimant challenged PFC Burum to try to knock claimant to his knees. The administrative law judge, however, determined that claimant's motivation for lying to the police officer, *i.e.*, he did not want to be accused of having engaged in an altercation, was apparently somewhat understandable, and that the variation in terms of the wager made no difference in his analysis of this issue.

credible testimony, the administrative law judge concluded that the conditions of claimant's employment, *i.e.*, the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol, created a special zone of danger out of which claimant's injury arose. In particular, the administrative law judge found that claimant's injury occurred while he was engaged in reasonable recreation. As these findings of fact are rational and within the administrative law judge's authority to make, they are affirmed.

In contrast to employer's contentions, the cases wherein the zone of special danger doctrine were deemed inapplicable are factually distinguishable from the case at hand. First, in *McNamara v. Mac's Pipe & Drum, Inc.*, 21 BRBS 111 (1988), a D.C. Act case, the claimant, an off-duty bartender was injured during a fight which began on employer's premises. Although claimant may have initially responded to employer's request to protect patrons and property in the event of an altercation, so that he was theoretically on duty, the Board affirmed the administrative law judge's finding that claimant acted voluntarily and beyond the scope of that request by going across the street to assist a patron who had run out of the bar with a two-by-four. The Board also affirmed the administrative law judge's finding that claimant was thoroughly disconnected from employer's service when he was injured, and that therefore the obligations or conditions of employment did not create any zone of special danger out of which the injury arose. Unlike *McNamara*, the administrative law judge here found claimant was not an aggressor. Moreover, it is also distinguishable from the instant case on the basis that it arose in a bar in D.C. and thus the scope of the zone of special danger was much narrower than here, where the

administrative law judge rationally found it encompassed the entirety of the Johnston Atoll, a remote and isolated location. In *McNamara*, by his own actions, the employee left the zone created by the obligations of his employment.

Similarly, in *Gillespie*, 21 BRBS 56, the Board reversed the administrative law judge's finding that claimant's death arose from the zone of special danger created by the conditions of his employment and thus his award of death benefits. In resolving this case, the Board distinguished *O'Leary* and *O'Keeffe*, on that ground that the record lacked any evidence which could be construed as supporting the administrative law judge's assumption that a relationship existed between the conditions created by the employee's job and the activity which occasioned his death.[7] Specifically, the Board, citing *O'Leary*, held that this was a case wherein the employee went "so far from his employment and [became] so thoroughly disconnected from the service of his employer" that it was unreasonable to say that his injury arose out of and in the course of his employment. *Gillespie*, 21 BRBS at 58, citing *O'Leary*, 340 U.S. at 507. In contrast, as discussed above, the administrative law judge in the instant case specifically considered the connection between claimant's injury and his work for employer and concluded, based on the evidence, that there was the requisite connection for the application of the zone of special danger doctrine, *i.e.*, that events resulting in claimant's injury were reasonably

7. In particular, the Board observed that the record lacks any evidence bearing on the claimant's motivation for engaging in the autoerotic activity which led to his death, as well as the fact that the circumstances surrounding his death do not in themselves suggest that the death was work-related. *Gillespie*, 21 BRBS 56.

foreseeable and related to his employment given the conditions associated with his job for employer on the Johnston Atoll.

Finally, the denial of benefits in *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), *aff'd mem. sub. nom. Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991), rested on the policy that a wrongdoer should not be allowed to benefit from his or her own wrong doing, and thus, contrary to employer's suggestion, did not turn on the inapplicability of the zone of special danger doctrine. In *Kirkland*, the administrative law judge determined that claimant's participation in the criminal activity leading to her husband's murder precluded her attempt to secure death benefits arising from his death. As such, the Board noted in a footnote that it need not address claimant's argument that the administrative law judge erred in finding that decedent was not killed in a "zone of special danger."[8] *Kirkland*, 23 BRBS at 353, n.6. Consequently, *Kirkland* is likewise inapplicable to the case at hand.

As the administrative law judge properly applied the "zone of special danger" doctrine in this case,[9] *see O'Keeffe*,

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8. In its decision, the Board held "that the policy prohibiting a spouse from recovering his or her ill-gotten gains, is equally applicable to this case arising under a Federal Act where a claimant, who has willfully participated in a felony leading to her husband's murder occurring in an alleged 'zone of special danger,' attempts to secure compensation benefits arising from the murder." *Kirkland*, 23 BRBS at 350.

9. Moreover, we hold that while the administrative law judge, at one point in his decision, incorrectly referred to *Hanson*, 305 F.2d 699, as *O'Keeffe*, 380 U.S. 359, Decision and Order at 8, he never-

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380 U.S. 359; *O'Leary*, 304 U.S. 504, and as his findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with the appropriate standards, his conclusion that claimant sustained a compensable injury under the Act, based on the specific facts of this case, is affirmed.

Employer also argues that the administrative law judge erred in awarding benefits to claimant since claimant's conduct resulted in his debarment from the Johnston Atoll by the base commander and justifiable discharge by employer. In support of its contention, employer cites *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director*, OWCP, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), for the proposition that where, as in the instant case, a claimant is justifiably discharged for violating company rules or performing unauthorized activities, he is not entitled to disability compensation benefits. Employer also argues that the administrative law judge's finding that claimant's expulsion from the island for participating in prohibited activity would not bar his claim for benefits is erroneous as it is based upon a misapplication of *O'Leary* and *O'Keeffe*, since in those cases employer did not seek to have the claimant terminated for violation of company standards.

In his decision, the administrative law judge found, assuming arguendo, that while claimant was engaged in

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theless set out and applied the appropriate standard, *i.e.*, whether claimant's behavior was foreseeable and reasonable given the context within which they occurred, in determining that although claimant may have violated some rules it did not preclude his recovery under the Act.

"unauthorized" or prohibited behavior (i.e., assuming that employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that claimant's behavior was unforeseeable. Specifically, in addressing this issue, the administrative law judge found that as in *O'Leary*, the incident of July 25, 1999, was certainly "foreseeable, if not foreseen" by employer, and thus the mere fact that fighting was prohibited does not necessarily preclude claimant's recovery under the Defense Base Act, even if fighting constituted grounds for expulsion from the atoll. Additionally, the administrative law judge concluded that claimant's conduct was not so egregious that it severed the relationship between his employment and the injury under the "zone of special danger" doctrine.

Employer's reliance on *Brooks* is misplaced. In that case, claimant was, as a result of an injury to his lower back sustained on May 19, 1986, intermittently off work through August 15, 1986, after which he was assigned light duty work in employer's tool room issuing tools. Claimant was subsequently discharged by employer on October 14, 1986, on the basis that he falsified company records. In its decision, the Board held that employer established suitable alternate employment as it was undisputed that claimant's post-injury job in its tool room was suitable for claimant. *Brooks*, 26 BRBS 1. Additionally, the Board held that because claimant's inability to perform the post-injury work at employer's facility on or after October 14, 1986 was due to his own misfeasance in violating a company rule, any total disability thereafter was not compensable under the Act inasmuch as it was not due to claimant's disability resulting from the work-related incident. *Id.* Thus, *Brooks* applies to

the situation wherein an employer has provided claimant with suitable alternate employment, *e.g.*, a light duty job in its facility with no loss in wage-earning capacity, and at some point thereafter claimant is discharged as a result of his own misfeasance. The holding in *Brooks* therefore does not, as suggested by employer, establish a rule barring all benefits in cases where claimant cannot return to post-injury work due to his own misfeasance. *See also Managaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Rather, Brooks addresses whether employer has a renewed burden to establish suitable alternate employment in cases where claimant is fired from a suitable post-injury job for cause.

In the instant case, claimant was never offered any position by employer post-injury, nor did employer establish that suitable alternate employment would have been available to claimant at pre-injury wages but for his discharge. Thus, the instant case does not present facts analagous to *Brooks*. In fact, at the time when claimant was permanently expelled from the atoll, August 5, 1999, claimant was totally disabled as a result of the injury sustained on July 25, 1999. In contrast to *Brooks*, claimant was not able to work when he lost his job with employer. Indeed, the parties stipulated that claimant was temporarily totally disabled from July 25, 1999, to January 1, 2000, and permanently partially disabled thereafter due to his July 25, 1999, left hip injury. Employer's burden to establish the availability of suitable alternate employment was not altered by claimant's dismissal from the atoll, as it is undisputed that claimant cannot perform his usual employment. Employer did not attempt to show the

availability of suitable alternate employment until well after the date of claimant's dismissal when it completed its labor market survey, December 15, 2000. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999). Consequently, we hold that Brooks is inapplicable to the present case, and employer is liable for total disability benefits, based upon its stipulation, until January 1, 2000, and for partial disability benefits thereafter.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER AWARDING BENEFITS OF THE UNITED STATES DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES DATED JUNE 13, 2001

U.S. Department of Labor

Offices of Administrative Law Judges
Suite 405
2600 Mt. Ephraim Avenue
Camden, NJ 08104
(856) 757-5312
(856) 757-5403 (FAX)

Issue date: 13Jun2001

CASE NO.: 2000-LHC-01877

In the Matter of

MICHAEL ILASZCZAT

Claimant

v.

KALAMA SERVICES

Employer

and

ACE USA

Carrier

and

Appendix C

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

Before: Robert D. Kaplan

Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (the Act), as extended by the Defense Base Act, 42 U.S.C. 1651, et seq., and the regulations promulgated under the Act.

On April 17, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on December 20, 2000 in Honolulu, Hawaii, where the parties had full opportunity to present evidence and argument. The following exhibits were received post-hearing: literature from Kalama Services describing its services on the base (CX 38); Dr. Nehmer's report of February 16, 2001 (EX D); Employer's § 8(f) application (EX G); November 15, 2000 letter from OWCP regarding § 8(f) application (EX H); Director's Notice of Appearance (EX I); and my Decision and Order of February 9, 2001 (EX J).[1] Based on my prior ruling, these exhibits are

1. The following abbreviations are used herein: "CX" denotes Claimant's Exhibit; "EX" denotes Employer's Exhibit; "T" denotes

(Cont'd)

now received into evidence. Claimant and Employer/Carrier (hereinafter referred to collectively and individually as Employer) submitted briefs on April 12 and April 16, 2001, respectively. On May 17 and June 4, 2001, the parties further described their positions. This determination is based on an analysis of the record, the arguments of the parties, and the applicable law.

I. *PROCEDURAL HISTORY*

The hearing on December 20, 2000 pertained to a claim for a 1996 injury to Claimant's left lower extremity, and a 1999 injury to Claimant's left hip, both of which occurred while he was on Johnston Atoll. Claimant's 1996 injury occurred while he was working as a civilian employee managing a store on Johnston Atoll. Claimant underwent three operations, including a total left knee replacement in December 1998. (T 44-48)

On February 5, 2001, I received Claimant's and Employer's "Stipulations for Trial and of Scheduled Injury to Left Lower Extremity." (EX J) On February 9, 2001, I accepted the stipulations and issued a Decision and Order awarding a 70% permanent disability schedule award under § 8(c)(2) for Claimant's 1996 injury. (EX J) The instant claim pertains to issue relating to only the 1999 injury.

(Cont'd)

the transcript of the December 20, 2000 hearing. Where there is duplication of exhibits between the parties, reference is made to Claimant's exhibit only.

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II. *CONTENTIONS OF THE PARTIES AND ISSUES PRESENTED*

A. *Background*

The remaining question pertains to the injury to Claimant's left hip, which occurred on July 25, 1999 on Johnston Atoll. Johnston Atoll is a two miles long by one-half mile wide island located west-south-west of Hawaii in the Pacific Ocean. (CX 37, 38) The island is owned by the United States government. (T 52-53) It is utilized by the United States military for storage and decommissioning of chemical, nuclear, and other toxic weapons. (CX 3 8; T 36) Inhabitants of the island are given gas masks and injectors that they must keep with them at all times, as there is risk of contamination from exposure to toxic chemicals. (T 37-39) Kalama Services is a contractor of the United States military responsible for providing operating and maintenance services on Johnston Atoll. (CX 38; T 43-44) No civilians on the island may leave it without the prior authorization of Kalama Services. (T 63-64)

Claimant was born on September 20, 1948. (T 32) In August 1996, Claimant began working for Kalama Services on Johnston Atoll as the manager of the "Self-Help Store." (T 33) The store provides local residents, military and civilian, with materials and tools for individualized projects on the island, (e.g., supplies to make shelves; authorization for, and follow-up inspection of, air conditioning installation).[2] (T 33) While at work in December 1996,

2. Following Claimant's recovery from the 1996 injury, he returned to Johnston Atoll in early 1999 and continued working as manager with physical restrictions. (T 48-49)

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Claimant suffered an injury to his left leg. Claimant alleges that he subsequently injured his left hip on July 25, 1999, while engaging in a recreational activity after he finished working. He contends that the activity in which he was engaged at the time of the 1999 injury is covered under the "zone of special danger" doctrine applicable under the Defense Base Act. Employer disputes entitlement and contends that Claimant's conduct was not causally related to his employment, even under the zone of special danger doctrine. Employer specifically argues that Claimant's conduct leading to the July 25, 1999 injury was not authorized by either Employer or the base commander, and was in express violation of the standards of conduct applicable to employees on Johnston Atoll, as it ultimately led to Claimant's expulsion from the island by the military commander of the base. (Employer's Brief at 25) Claimant contends that he is entitled to compensation for temporary total disability from the date of the injury to the date of maximum medical improvement, and compensation for permanent partial disability thereafter. (Letter dated May 17, 2001, from Claimant's attorney to the undersigned.)

B. *Stipulations and Issues Presented*

The parties entered into the following stipulations:

- The parties are covered by the Act as extended by the Defense Base Act. (T 113-114)

- Claimant was temporarily totally disabled from July 25, 1999 to January 1, 2000, due to the left hip injury that occurred on July 25, 1999. (Letter dated June 4, 2001, from Employer's attorney to the undersigned.)

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- Claimant attained maximum medical improvement on January 1, 2000. (EX J)

- Since January 1, 2000, Claimant has been permanently partially disabled due to the left hip injury that occurred on July 25, 1999. (EX J; T 17)

- Claimant's average weekly wage with regard to the 1999 injury is $803.38, with an applicable weekly compensation rate of $535.65. (EX J; T 16-18)

- Claimant has a wage-earning capacity of $300 per week effective January 1, 2000, which results in an applicable reduced weekly permanent partial disability compensation rate of $335.65 commencing on that date. (EX J; T 16-18)

The specific issues presented for resolution are:

1. whether Claimant's July 25, 1999 injury was causally related to his employment on Johnston Atoll, and

2. if so; whether Employer and Carrier are entitled to § 8(f) relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. *SUMMARY OF THE EVIDENCE*

In July 1999, Claimant left Johnston Atoll to visit his family in New York. Claimant returned to Johnston Atoll on July 24, 1999. After completing his work on July 24, 1999,

at approximately 9:30 p.m., he went to the Tiki Bar, one of several authorized social clubs on the island. (T 49-52, 57) Claimant testified that while there he had a couple of mixed drinks and played pool. He remained at the Tiki Bar until it closed at approximately 12:30 a.m. on July 25, 1999, and then went to the AMVETS, another club a few minutes away from the Tiki Bar. (T 72-75) At the AMVETS Claimant had two more mixed drinks. (T 133) The record contains varying accounts of the events of July 25, 1999. By all accounts, however, while at the AMVETS, Claimant fell and injured his left hip.

Claimant's version of the events of July 25, 1999 is that he approached a group of soldiers in the AMVETS, and, although he had never seen them before, he bought them drinks. (T 76-77) These men included Military Police Officer PFC Clyde Burum and PFC Benjamin Sanchez, Jr. (T 135) Claimant offered to play a game of pool with them for $10.00 a game, or $10.00 a ball. (T 87, 135-136) No one was interested in Claimant's offer, so he left their table and played a game by himself. Shortly thereafter, he returned. (T 88) Claimant testified about his second interaction with the soldiers, as follows:

> [T]here was a couple of the military guys sitting at the bar and somehow the subject got around to martial arts ... [Burum] said he was really good at it and I said, "Well, you can't be that good at it, you know, because your hand's all screwed up." ... [H]e said that he could take his leg and put it over my head without touching me ... I said "That's impossible, ... I'm almost six foot tall."...

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> [H]e says "No, I can do that." . . . I took my card out and I showed him my card where I got the artificial knee and I rolled up my pants to show him the scar on my other leg and he says, "No, I can do it without touching you" . . . He was pretty insistent upon showing me how he could lift my [sic] leg over my head without touching me. . . . So I went to the back of the room where the pool table and that picnic table [were] and I put my drink down on the picnic table and when he went to kick me, his foot only came up to here and I blocked it . . . I turned around and I said "No, that's it. Bull----." . . . I picked up my drink to walk away and the next thing I know I was on the ground and my hip was broken. (T 85-86)

Although Claimant initially testified that he was not interested in participating, he conceded that he had bet Burum a hundred dollars that Burum could not "put [his] leg over [my] head without touching [me]," and that he accepted Burum's offer to "demonstrate" this kick. (T 88-89, 103-104) Claimant testified that no hostile words were exchanged prior to this "demonstration."[3] (T 89)

When describing how he had fallen, Claimant testified that Burum may have "swept" his foot out from under him, or kicked him. Claimant gave conflicting testimony as to whether or not he fell on his own. (T 92, 111-112) Nevertheless, Claimant stated that the position in which he landed indicated

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3. Claimant testified that he was threatened by Burum afterwards (i.e., Burum later stated that he would "kill [Claimant]" if Claimant told anyone about the incident). (T 112-113)

that he had not fallen down on his own. (T 113) Claimant was also told by Dr. Worth at the clinic that the severity of the break could not have happened from a fall alone. (T 112) According to Burum and Sanchez, however, immediately after the demonstration, Claimant "charged" at them and then lost his balance and fell. (CX 20, p. 21-24; CX 18, p. 39-40, 93-96, 99) I find Claimant's version of the events to be more credible and supported by the evidence.[4]

Paramedics and a police officer arrived on the scene and Claimant was taken to the Kalama Services Clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. (T 101-103) While recovering from surgery, Claimant received notice from the base military commander Colonel Jeffrey A. Thomas that he was expelled from the atoll and was precluded from ever returning. (T 107) The order prohibits Claimant from returning because of the events of July 25, 1999, and characterizes those events as an "altercation." (CX 10, p. 2)

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4. The police officer on the scene, Gwendolyn Schmidt-Smith, testified that Claimant told her he had been playing pool when his knee gave out and he fell down. (CX 10, p. 9; CX 19, p. 39; CX 30, p. 3) Claimant himself testified, however, that this was not correct, and that the only reason he said that was because he did not want to be accused of having engaged in an altercation. (T 150-151) There is also conflicting testimony from eyewitness regarding the exact "terms" of the "wager." There is testimony that Claimant challenged Burum to try to knock Claimant to his knees. (CX 17, p. 25; CX 18, p. 28-29; CX 20, p. 18-19) I find that this variation would make no difference in my analysis.

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II. *APPLICABLE LAW*

A. *Defense Base Act Coverage*

The Act as extended by the Defense Base Act applies:

> in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work.

42 U.S.C. § 1651(a)(4).

"Public work" is defined as follows:

> [T]he term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

42 U.S.C. § 1651(b)(1).

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In the instant case, Claimant was employed by Kalama Services, a contractor for the United States military responsible for providing operating and maintenance services on Johnston Atoll. Kalama Services' brochure describes its role and responsibilities on the atoll as follows:

> Kalama Services is responsible for base operating services including, operating and maintaining the power generation plant; water desalination plant and all related facilities. Kalama Services is responsible for management; administration; preventative and corrective maintenance; engineering; planning; logistics; security; customer service and billing; housing and food service. Kalama Services provides custodial maintenance of all buildings; grounds upkeep including landscaping refuse collection; operations of the beauty and barber shops; laundry services and operation of recreational facilities.

(CX 38)

I find that the parties' stipulation to jurisdiction under the Defense Base Act is supported by the evidence, as the contract between Kalama Services and the United States military involves a project in connection with the national defense.[5]

B. *The "Zone of Special Danger" Doctrine*

Claimant bears the burden of establishing every requisite element of entitlement by a preponderance of the evidence. *Director Office of Workers' Compensation Programs, Dept.*

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5. The contract that Kalama Services works under requires Defense Base Act disability insurance coverage. (T 115)

of Labor v. Greenwich Collieries (Maher Terminals, Inc.), 512 U.S. 267 (1994).

Under the Act, Claimant bears the burden of proving that the alleged injury arose from a condition of, or in the course of, his employment. Under the Defense Base Act, however, the "condition or course of employment" standard has been expanded by the "zone of special danger" doctrine. The "zone of special danger" doctrine was first enunciated by the U.S. Supreme Court in *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 506-507 (1951), as follows:

> The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident. [internal citation omitted] Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. [internal citation omitted]

The Act provides a broad degree of coverage and entitlement to benefits which have been denied to employees only when they have been injured in "extreme circumstances with little, if any, connection to their employment." *Carlson v. Raytheon Services*, 33 BRBS 583, 589 (ALJ) (1999). Cases in which benefits have been denied include one situation where the employee asphyxiated himself while engaged in an autoerotic activity. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988). Another such case involved denial of a claim for death benefits where the widow of the employee participated in a robbery that led to the murder of her husband. *Kirkland v.*

Air America, 23 BRBS 34S (1990). On the other hand, entitlement to benefits has been granted where the employee drowned in an after-hours boating accident 30 miles from his jobsite, *O'Keefe v. Smith. Hinchman & Grylls Associate*, 380 U.S. 359 (1965); where the employee was parked in a car in a recreation area and was hit by an army weapons carrier, *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962); and where the employee was injured in a jeep accident after hours even though the jeep may have overturned due to excessive speed, and authorization to use the jeep was not certain. *Pan American World Airways, Inc. v. O'Hearne*, 335 F.2d 70 (4th Cir. 1964). In most cases, the nature of the activity must fall well outside the parameters of what is considered "recreational activity" and the foreseeable consequences related to such recreational activity in order to sever the relationship between a claimant's employment and the injury suffered.

III. *DISCUSSION*

A. *Claimant's Injury was Causally Related to his Employment Under the "Zone of Special Dancer" Doctrine*

I find that Claimant injured his hip in the incident with Burum, which can best be described as a brief one-sided scuffle occurring after Claimant had imbibed several alcoholic drinks. The first question then is the extent to which Claimant's drinking contributed to the injury to his hip on July 25, 1999. Section 3 (c) of the Act provides:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee. . . .

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Section 20(c) of the Act provides a presumption that a claimant's injury was not caused solely by the intoxication, and an employer has the burden of providing evidence which permits no other rational conclusion but that intoxication was the sole cause. Proof of intoxication alone is insufficient. *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986). When Claimant was brought into the emergency room on the morning of July 25, after he was injured, his blood alcohol level was 109, which nurse Joseph Kilpatrick testified indicated that Claimant was intoxicated. (EX B, p. 10; CX 22, pp. 39, 41-42). Assuming that Claimant was intoxicated, I find, however, that the evidence fails to establish, pursuant to § 3(c), that the intoxication was the sole cause of his injury. At most, Claimant's drinking may have been a contributing factor (i.e., had Claimant not been under the influence of alcohol he might have realized that his best course of action was simply to walk away from Burum when Burum became aggressive). But this is speculative. Further, there is no evidence that Claimant initiated the scuffle with Burum, and it is apparent that he was a somewhat reluctant participant in the incident.[6]

The next question is whether Claimant has established a relationship between his injury and his employment under the zone of special danger doctrine. I find that he has. Claimant and the other employees on Johnston Atoll had limited choices and opportunities for recreation. Presumably, this is the reason that the military authorized the operation of "social clubs" on the atoll. With the existence of clubs serving alcohol to the employees and the employees' lengthy

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6. Moreover, it appears that Employer has conceded that there is no evidence that Claimant's injury was due solely to his intoxication. (T 101)

periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and Employer that risky horseplay or scuffles such as that which occurred on July 25, 1999, would occur from time to time. Although the Court in *O'Leary* acknowledged that there would likely be cases where the employee's conduct "might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment," I find that this is not such an instance. *O'Leary*, 340 U.S. at 507. Finally, the evidence shows that Claimant participated in the "demonstration" thinking that he would not get hurt because Burum would accomplish what he had promised or because Claimant would be able to block the kick. (T 147-148)

Assuming *arguendo* that Claimant was engaged in "unauthorized" or prohibited behavior (i.e., assuming that Employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that Claimant's behavior was unforeseeable. Rather, as in *O'Leary*, the incident of July 25 was certainly "foreseeable, if not foreseen" by Kalama Services. *Id.* at 507. In *O'Leary*, the rescuing employee jumped into a swimming area that employees were prohibited from entering in order to rescue another person. *Id.* at 505. Nevertheless, the Supreme Court found that the employee's actions were foreseeable and reasonable given the context within which they occurred. In *O'Keefe*, entitlement was found for a jeep accident even though there was some question as to whether use of the jeep had been authorized. Therefore, the mere fact that fighting is prohibited does not

necessarily preclude Claimant's recovery under the Defense Base Act, even if fighting constituted grounds for expulsion from the atoll. Finally, I find that Claimant's conduct was not so egregious that it severs the relationship between his employment and the injury under the zone of special danger doctrine. *Cf.* § 20(a) of the Act.

Based on the foregoing, I find that Claimant has established a relationship between his injury and his employment, and he is entitled to benefits under the Act as extended by the Defense Base Act.

B. *Compensation for Disability*

The parties have stipulated that Claimant was temporarily totally disabled from July 25, 1999 until January 1, 2000. (Letter dated June 4, 2001, from Employer's attorney to the undersigned.)

The parties also stipulated that Claimant's applicable average weekly wage is $803.38. This was derived from his contract rate of $15.45 an hour for a 52-hour week. (Claimant worked a 48-hour week, and 8 of those hours were at time-and-a-half) For purposes of temporary total disability for the period from July 25, 1999 to the date of permanency, January 1, 2000, Claimant's 1999 rate is $535.6 per week, pursuant to § 8(b).

In addition, the parties stipulated that Claimant reached maximum medical improvement with regard to the July 25, 1999 injury on January 1, 2000 and that he had a permanent partial disability as of that date. (T 16-17) The parties agree

that as of January 1, 2000, Claimant had a wage-earning capacity of $300.00 per week. This results in a permanent partial disability compensation rate of $33.60 per week, pursuant to § 8(c)(21). (T 16-17) I find that the stipulation regarding alternative wage-earning capacity is supported by the vocational reports in evidence. (EX C)

C. *Medical Benefits*

Employer concedes that if found liable, Employer is responsible for § 7 medical benefits related to the 1999 accident. Claimant also contends, however, that after his hip surgery, his chronic osteomyelitis of the tibia "flare[d] up" again. (T 108) Claimant also argues that he has developed numbness in his hands due to carpal tunnel syndrome from using a cane and crutches after his hip surgery. (T 109) Finally, he reports that he now has back pain and has had two epidural injections because he cannot stand up straight. (T 110)

Claimant's treating physician, Dr. Gregory H. Chow, submitted several medical reports since the 1999 injury. In the most recent record, dated November 16, 2000, he wrote as follows:

> It is my opinion that the injury to [Claimant's] left hip has directly caused re-activation of his right tibia osteomyelitis which had been quite quiescent for many years in spite of multiple previous surgeries on his left lower extremity.

(CX 12) Dr. Chow explained that this "reactivation" was due to "increased demand" on the left lower extremity. In addition, Dr. Chow reported that there is also demand on Claimant's

upper extremities, due to his use of crutches and a cane, that has "possibly caused" carpal tunnel symptoms in both upper extremities. (CX 12) Finally, he reported that because Claimant is having difficulty walking, "he has started to have more back problems as well," and that these symptoms have "gotten bad enough that he has required epidural steroid injections." (CX 12) Dr. Chow's records reflect the osteomyelitis "flare-up" as early as August 9, 1999 and contain reports of back problems as early as December 29, 1999. (CX 12, p. 4-5) Dr. Chow's medical report is uncontradicted. I therefore find that Claimant's pain in the right tibia and back are causally related to the 1999 injury. Therefore, the cost of Claimant's medical treatment for back pain and tibial osteomyelitis should be paid by Employer pursuant to § 7. I further find, however, that Dr. Chow's finding regarding carpal tunnel is equivocal, as he reports only that there is a "possibl[e]" causal connection between the carpal tunnel syndrome and the added demands on Claimant's upper extremities. Therefore, I find that Employer is not liable for expenses relating to treatment for carpal tunnel syndrome.

D. *Section 8(f) Relief*

Section 8(f) is invoked in situations where a work-related injury combines with a preexisting partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991) It shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the employer to the Special Fund, established by § 44, when the disability or

death is not due solely to the injury which is the subject of the claim. § 8(f). Under § 8(f) the employer is liable for only the first 104 weeks of compensation and the Special Fund is responsible for paying weekly compensation thereafter.

Employer filed a protective application for § 8(f) relief on November 6, 2000, with the District Director after the claim had been referred to the Office of Administrative Law Judges (hereinafter "OALJ").[7] (EX G) Section 8(f)(3) permits the Director to raise an absolute defense to the special fund's liability for the payment of benefits when an employer does not file an 8(f) application prior to the District Director's consideration of the claim. On November 15, 2000, however, the District Director wrote a letter to Employer indicating that because the application for 8(f) relief was filed after the case was referred to the Office of Administrative Law Judges, OWCP had no jurisdiction to review the application and, furthermore, because permanency had not been discussed at the District Director level, § 8(f) relief would not have been applicable while the case was pending before him. (EX H) Pursuant to 20 C.F.R. § 702.321(c):

> Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the District Director to preserve the employer's right to later seek relief under section 8(f) . . .

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7. The District Director filed a notice of appearance on December 4, 2000 and argued that 8(f) relief was inappropriate because Employer had not submitted a medical report. That report, however, has since been submitted and received into evidence, and is discussed below.

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Maximum medical improvement in this case was not established until January 1, 2000. I find, therefore, that the absolute defense does not apply to this case. Therefore, I will address the merits of Employer's request for 8(f) relief.

In order for an employer to qualify for relief under Section 8(f), the employer must show that (1) the claimant had a preexisting permanent partial disability, (2) which was manifest to the employer prior to the subsequent employment demise, and (3) the preexisting permanent partial disability combined with the injuries suffered in the most recent incident to cause a materially and substantially greater disability than would have resulted solely from the subsequent incident. § 8(f); *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314 (11th Cir. 1988); *Director, OWCP v. Newport News Shipbuilding and Dry Dock*, 8 F.3d 175 (4th Cir. 1993) *aff'd*, 514 U.S. 122 (1995).

Claimant previously was found to have suffered a scheduled permanent partial disability of 70% of the left lower extremity under § 8(c)(2) of the Act, thus satisfying the first requirement. (EX J) Second, Claimant's preexisting permanent partial disability to his left lower extremity was manifest to Employer prior to the most recent incident. Indeed, Kalama Services had actual notice of the preexisting condition because it occurred while Claimant was working for Kalama Services. Claimant's preexisting permanent partial disability was also identified in the medical records relating to Claimant's treatment and operative care. These medical records include: the report from the total left knee replacement of December 10, 1998, Dr. Richardson's treatment records beginning on May 2, 1997, Dr. Morris

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Mitsunaga's evaluation report of October 31, 1997, return to work restrictions from Dr. Richardson effective April 5, 1999, Claimant's total knee replacement card, and Johnston Atoll Health Clinic records. (CX 3, 4, 6-9) These records document Claimant's preexisting left knee osteoarthritis, tear of the medial meniscus, total left knee replacement, and resultant permanent partial disability. Therefore, I find that Claimant's preexisting permanent partial disability was manifest to the Employer, thus satisfying the second requirement.

Finally, Dr. Steven L. Nehmer, submitted a report dated February 16, 2001, based on his review of the medical records and found that Claimant's present condition is not due solely to the accident of July 25, 1999 stating:

> [Claimant's] present permanent partial disability is not due solely to the July 25, 1999 accident but is a result of that accident in combination with the pre-existing permanent partial disability [related to his prior left knee surgeries]. It is my opinion that the present [permanent] partial disability is materially and substantially greater than that which would have arisen from the injury of 7/25/99 alone.

(EX D)

The record contains no medical evidence contradicting these findings. I therefore find that the evidence establishes that Claimant's permanent disability arising out of the incident of July 25, 1999 would be less severe were it not for Claimant's preexisting permanent partial disability.

In other words, the evidence establishes that Claimant's present permanent disability is not due solely to the July 25, 1999 injury and that Claimant's preexisting permanent partial disability combined with the July 25, 1999 injury to cause a materially and substantially greater disability than the second injury would have caused in and of itself. Therefore, I find that Employer has satisfied all three requirements for entitlement to 8(f) relief.

ATTORNEY'S FEE

No award of an attorney's fee for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby allowed to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. § 702.132 and 702.133 of the regulations. A service sheet showing that service has been made to all parties, including the Claimant, must accompany the application. Parties have thirty (30) days following receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The District Director shall make all calculations necessary to effect this Order.

It is hereby ORDERED that Employer Kalama Services or Carrier shall —

1. Pay Claimant Michael Ilaszczat compensation for temporary total disability benefits in the

amount of $535.65 per week from the period of July 26, 1999 to January 1, 2000.

2. Pay Claimant Michael Ilaszczat compensation for permanent partial disability in the amount of $335.65 per week for a period of 104 weeks beginning on January 1, 2000, the date of maximum medical improvement.

3. Pay medical benefits pursuant to § 7 of the Act, for treatment relating to Claimant's hip injury, the "reactivation" of Claimant's tibial osteomyelitis, and his current back condition.

It is further ORDERED that:

1. Employer is entitled to 8(f) relief.

2. The Special Fund shall pay Claimant compensation in the amount of $335.65 per week pursuant to §§ 8(c)(21) and 8(f) of the Act for permanent partial disability beginning after the 104 weeks referred to above, and continuing.

Employer is further ORDERED to pay Claimant appropriate interest on all past due compensation from the date each payment was originally due from each of them until the date paid.

s/ Robert Kaplan
Robert D. Kaplan
Administrative Law Judge

Supreme Court, U.S.
FILED
MAY 11 2004
OFFICE OF THE CLERK

(2)

No.03-1440

In The
Supreme Court of the United States
October Term, 2003

KALAMA SERVICES, INC. and ACE U.S.A. INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, and MICHAEL ILASZCZAT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

I. QUESTIONS PRESENTED

1. Whether or not the Ninth Circuit Court of Appeals has erred in upholding the "Zone of Special Danger" doctrine as applied to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. by upholding the Benefits Review Board's ruling that the injuries suffered by an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of his employment under the Defense Base Act, 42 U.S.C. §§1651, et seq.

2. Whether review should be granted to determine whether or not the 50 years of Zone of Special Danger doctrine needs a clearer definition than "personal frolic" in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 507 (1951) to set the limits of behavior excluded from coverage under the Defense Base Act.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Respondent Michael Ilaszczat, a U. S. citizen, is an injured employee of Kalama Services on Johnston Atoll covered under the Longshore and Harbor Workers' Compensation Act as amended, 33 U.S.C. 901, et seq. (the Act) as extended by the Defense Base Act, 42 U.S.C. 1651, et seq., and the regulations promulgated under the Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at 354 F.3d 1085 (9th Cir. 2004). The Decision and Order of the Benefits Review Board dated June 19, 2002 is published at 36 BRBS 78 (2002). The Decision and Order Awarding Benefits dated June 13, 2001 is published at 35 BRBS 627 (ALJ)(2001).

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on January 15, 2004. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutes involved are the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901, *et seq.* (hereinafter "LHWCA") and the Defense Base Act, 42 U.S.C. §§1651, *et seq.* (hereinafter "DBA").

I. RESPONDENT'S STATEMENT OF THE CASE

This case is on appeal from the hearing on December 20, 2000 (hereinafter "hearing") before Administrative Law Judge Robert D. Kaplan (hereinafter "ALJ"). Michael Ilaszczat (hereinafter "Claimant") was a civilian employee managing the "self-help store" on Johnston Atoll (hereinafter "JA"). The claimant suffered two major injuries while employed by Kalama Services - one in 1996, resulting in a knee replacement, and one in 1999, resulting in a hip replacement. Kalama Services provides a plethora of support services that includes the operation of recreational

facilities and some of the Social Clubs/bars on JA. Claimant is a well-liked gregarious individual who was known on the island as the "Mayor of JA", in part because he was the man you had to go to to get an air-conditioner for your apartment. See, Appendix C, p. 34(a) to Petition for Writ of Certiorari of Kalama Services and Ace USA, Inc. (hereinafter "Appen. C-34a"). The hearing before the ALJ only pertained to issues related to the 1999 injury in the Tiki social club/bar on JA. Appen. C-34a.

Claimant injured his left hip on July 25, 1999 when he fell to the floor in a bar on JA while engaging in recreational activity after he finished work. The parties stipulated that the event is covered by the LHWCA as extended by the DBA, which includes the "Zone of Special Danger" (hereinafter "ZSD") doctrine. The only appeal issue preserved by petitioners is the ALJ's finding that the claimant's July 25, 1999 injury was causally related to his employment with Kalama on JA.

Claimant, A New Yorker, returned to JA from visiting his sick mother who was in the hospital in New York City. It was a direct flight with one brief stopover in Honolulu. He arrived on JA less than 12 hours before his injury. He went in to work at his office for a couple of hours on July 24, 1999. He then took a nap and a shower. At approximately 9:30 p.m., experiencing jet lag, Claimant went to the Tiki Bar, one of about seven authorized social clubs/bars on JA to unwind. The claimant had a couple of mixed drinks [White Russians] and played pool. He remained at the Tiki Bar until it closed at approximately 12:30 am, and early on July 25, 1999, he then went to the AMVETS, another social club/bar a few minutes away from the Tiki Bar. The claimant had two more mixed drinks [White Russians]. The record contained varying accounts of

the events of the brief period of time at the Tiki bar before the incident early in the morning of July 25, 1999. By all accounts, while at the AMVETS, claimant fell and injured his left hip. Claimant tried to get some people in the Tiki bar to play pool with him. He bought drinks for patrons of the Tiki Bar as he tried to get someone to play pool with him. One patron for whom Claimant bought drinks, Military Policeman ("MP") Burum, had injured knuckles which he claimed came from karate practice. Claimant said words to the effect that "you must not be very good at it." Burum told Claimant he was so good at karate that he could put his foot over Claimant's head without touching Claimant.

Claimant testified that he had bet MP Burum $100 that Burum could not [put] [his] leg over [Claimant's] head without touching [Claimant]. He then accepted Burum's offer to "demonstrate" this karate kick. All witnesses testified that no hostile words were exchanged prior to this "demonstration". Claimant gave conflicting testimony as to whether or not he fell down on his own. The position in which he landed indicated to him that he had not fallen down on his own. Claimant was also told by his treating doctor at the JA Medical Clinic that the severity of his pelvis break could not have happened from a fall alone. This version differed from the testimony of MP Burum and MP Sanchez who claimed that claimant "charged" at Burum and then lost his balance and fell.

Paramedics and police officers took the claimant by stretcher to the Kalama Services Clinic on JA where he stayed for two days, after which he was transferred to Hawaii for hip surgery. A few days later, while recovering from surgery in Honolulu, a representative of claimant's employer gave claimant a notice from the military base commander which said that he was expelled from the Atoll

and was precluded from ever returning. Claimant did return to JA during the discovery phase of the Hearing and participated in the depositions and inspection and photographing of the location of the incident. The Military Order prohibits claimant from returning to JA because of the events of July 25, 1999, and characterizes those events as an "altercation." The military police officer, Schmidt-Smith, who took claimant to the clinic reported that claimant told her that he had been playing pool and that he was walking back from the pool table when his knee gave out and he fell down. Claimant testified in his deposition and at trial, however, that this was not correct, and that the reason he said this was because he did not want to be accused of having engaged in an altercation. There was conflicting testimony from eye witnesses regarding the exact terms of the "wager". There was testimony from the MPs that claimant challenged Burum to try to knock claimant to his knees.

JA is a 2-mile long by ½ mile wide mostly man-made island located west southwest of Hawaii in the Pacific Ocean. It is owned by the United States government. It is utilized by the United States military for storage and decommissioning of chemical, biological, nuclear and other toxic weapons. Habitants of the island are given gas masks and hypodermic injectors with various drugs that they must keep with them at all times, as there is risk of contamination from exposure to toxic chemicals, biological weapon material and nuclear wastes.

Habitants also get neck tags that they must put on after each self-injection in case of an exposure to help to keep them from being killed by those who might find them after an exposure and after they had tried to treat themselves.

Kalama Services is a DBA contractor to the United

States military responsible for providing operating and maintenance services on JA including the operation of various social clubs/bars. Civilians on JA may not come to or leave the island without prior authorization of Kalama Services and the military. These facts support the ALJ's finding that JA is a "ZSD."

The sole question on appeal which was presented to the ALJ is whether claimant's July 25, 1999 injury was causally related to his employment on JA.

II. SPECIFIC FINDINGS OF FACT AND LEGAL ANALYSIS BY ALJ KAPLAN

In the ALJ's Decision and Order Awarding Benefits, see Petition for Writ of Certiorari, Appendix C-p.32a (hereinafter "Appen. C-32a"), the ALJ made certain specific findings of fact in support of his decision.

Claimant first went drinking at the Tiki Bar, an authorized social club on the island that is run by his employer. Appen. C-37a. Claimant had a couple of mixed drinks and played pool at the Tiki Bar. He then went on to AMVETS and more mixed drinks. While at the AMVETS, claimant fell and injured his left hip. Appen. C-37a. Claimant accepted MP Burum's offer to demonstrate his karate kicking skill, i.e., the ability to place his foot over Claimant's head without hurting the Claimant. No hostile words were exchanged prior to the demonstration. Appen. C-38a.

Claimant testified that he was threatened by MP Burum afterwards (i.e., Burum later stated that he would "kill [claimant]" if claimant told anyone about the incident. Appen. C-38a. There was no testimony by any person that

there were any violent or threatening words exchanged prior to claimant's injury. The ALJ specifically found that claimant's version of the events to be more credible and supported by the evidence. Appen. C-39a. The ALJ found that the variations in the testimony regarding the description of the activities made no difference in his legal analysis of this case and the application of the ZSD doctrine. Appen. C-39a, fn. 4.

The ALJ appropriately applied the controlling legal authority and the relevant legal standards regarding the ZSD. Dir., Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267(1994); O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506-507 (1951). Appen. C-42a.

The ALJ also reviewed the various cases finding limits to coverage under the DBA under the doctrine of "ZSD". Coverage for DBA injuries is only denied where the injury occurs in "extreme circumstances with little if any connection to their employment." Carlson v. Raytheon Services, 23 BRBS 589 (ALJ) (1999). The Benefits Review Board (hereinafter "BRB") reversed a finding of coverage for an employee asphyxiated while engaging in an autoerotic activity. Gillespie v. General Electric Company, 21 BRBS 56 (1988). A widow who plotted her husband's murder could not recover his death benefits under the DBA. Kirkland v. Air America, 23 BRBS 348 (1990). An employee drowned in a boat accident 30 miles from the job site while bringing sand in a little boat across a lake for improving the beachfront on his vacation home unrelated to his work was found to be covered [arguably this is the least compensable of all the cases finding coverage under "ZSD" in a DBA claim]. O'Keefe v. Smith Hinchman & Grylls Associates, 380 U.S. 359 (1965). An employee parked

with her Supervisor for recreational sexual activities in the moonlight by a remote bay on the island of Guam was hit by a military vehicle and the claim was found compensable under the DBA. Self v. Hanson, 305 F.2d 699 (9th Cir. 1962); An after-hours car accident where claimant was speeding and not authorized to use the vehicle found covered under the DBA. Pan-American World Airlines, Inc. v. O'Hearne, 335 F.2d 70 (4th Cir. 1964). Appen. C-42a and C-43a.

The ALJ stated that "the nature of the reviewed activity must fall well outside the parameters of what is considered 'recreational activity and the foreseeable consequences related to such recreational activity in order to sever the relationship between a claimant's employment and the injury suffered'." Appen. C-43a. The ALJ specifically found that claimant injured his hip in the incident with Burum, which he described as "**a brief one-sided scuffle** occurring after claimant had imbibed several alcoholic drinks." (emphasis added) Appen. C-43a. The evidence failed to establish that claimant's intoxication was the sole cause of his injury removing intoxication from the legal analysis. Appen. C-44a.

There was no credible evidence that claimant initiated the scuffle with Burum. It was apparent to the ALJ that claimant was a somewhat reluctant participant in the incident. Appen. C-44a. The ALJ found that claimant established a relationship between his injury and his DBA employment under the "ZSD" doctrine. Appen. C-44a.

Claimant and other DBA employees on JA had limited choices and opportunities for recreation. This is the reason that the military authorized the operation of the "Social Clubs" on the atoll. With the existence of clubs

serving alcohol to employees and the employees' lengthy periods of isolation in the middle of the Pacific Ocean, the ALJ found that it was clearly foreseeable by both the military authority and the DBA employer that risky horseplay or scuffles such as that which occurred to the claimant would occur from time to time. Appen. C-44a-45a. The ALJ found that this was not an instance in which the employee's conduct went so far from his employment and became so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injury suffered by him arose out of and in the course of his employment. Appen. C-45a. Claimant participated in the "demonstration" thinking that he would not get hurt because MP Burum would accomplish what he had promised or because claimant would be able to block the kick. Appen. C-45a. Even if claimant was engaged in "unauthorized" or prohibited behavior, i.e., assuming that Employer's characterization is accurate and the incident involving wagering and fighting, this fact alone does not necessarily establish that Claimant's behavior was unforeseeable. The incident was certainly "foreseeable", if not foreseen by claimant's DBA employer, Kalama Services. Appen. C-45a. The ALJ found that the mere fact that fighting is prohibited does not necessarily preclude claimant's recovery under the DBA, even if fighting constituted grounds for expulsion from the atoll. Appen. C-46a. Claimant's conduct was not so egregious that it severs the relationship between his employment and the injury under the ZSD doctrine. Appen. C-46a.

III. REFLECTIONS ON PETITIONER'S QUESTIONS PRESENTED

The novel spin on the facts and derogatory attacks by Petitioner on the 9th Circuit Court of Appeals alone should

not be sufficient to obtain a Writ of Certiorari from this Court. The repeated use of the word "circumvented" by Petitioner is a particularly charged presentation of the Court of Appeals decision. Circumvention is the act of prevailing over another by arts, address, fraud, deception, imposture, or delusion. Circumventive behavior is deceiving by artifices or deluding. A circumventor is one who gains his purpose by cunning. Such malice is absent in the 9th Circuit decision. Petitioner is arguing for Certiorari because of the need in the Defense Contracting industry for a clearer definition of coverage than that afforded in the 1951 case of O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506-507 (1951). Appen. C-42a.

The ZSD is a "judicially created" doctrine and this Court should have the responsibility for its proper interpretation and administration. Granting Certiorari would benefit both the employer and DBA workers as this case presents a novel question of the relationship of the Military Command Order to the DBA coverage. There is no reported split amongst the circuits in the interpretation of the ZSD doctrine. The ZSD doctrine is applied on a case-by-case basis. This is because the first question always concerns the environment that the employees are working in and the variable special dangers the workers are exposed. Petitioner is correct in looking for some clear definitions of "what's in" and "what's out" of coverage. Employees like Claimant deserve to know if they are entitled to coverage during their off-clock time. Remember, these cases arise from situations where injured U. S. citizen civilian contractor workers are denied medical benefits and Workers' Compensation payments and must fend for themselves because their employer is testing a vague area of the law. Claimant was abandoned by his U. S. government contractor employer and its approved insurance carrier while he lay in the hospital

recuperating from a hip replacement.

The Petitioner complains of the imposition of "absolute liability" without explanation. Workers' Compensation coverage is absolute in the sense that it is the exclusive remedy available to the worker against his employer. Liability coverage under the ZSD is not absolute in that there are "unreasonable recreation" and "relationship to work" exceptions.

There was no finding by the ALJ that the claimant engaged in actions which were "prohibited by the United States military command and unrelated to the contractors' employment functions." The ALJ did not find an "altercation" had occurred. Black's Law Dictionary defines "altercation" as: Warm contentions in words. Dispute or controversy carried on with heat or anger. Ivory v. State, 128 Tex.Cr.R. 408, 81 S.W.2d 696, 698 (1935). Black's Law Dictionary, 5th Ed., (1979). The testimony was that in past instances of an "altercation" on JA, both parties to the altercation were expelled or "debarred." Claimant received his debarment letter while he was in the hospital in Honolulu. There were no consequences to MP Burum who the ALJ found to be the aggressor in the one-sided "demonstration" after a full adversarial hearing before the ALJ.

The employer argues for Certiorari because the number of DBA cases is increasing exponentially as the privatization of U. S. military functions expands in response to "terrorism" and "nation-building obligations." These representations in their Petition are supported by the news and current events without statistical data from the Dept. of Labor. The ZSD doctrine has never been addressed by Congress.

The fate of these injured American workers risking their life and health to serve their country for extraordinary high pay in dangerous and remote locations abroad is uniquely in the hands of this Court. DBA claims are proportionate to U. S. military actions. There are problems for DBA employers knowing the extent of their exposure and problems for DBA employees believing they have 24/7 coverage on these jobs vital to the security of our nation.

The ALJ did not apply nor does Respondent believe that he should have applied military standards of conduct to this civilian Workers' Compensation claim. If questionable military investigations are controlling when applied to LHWCA Procedures, then Certiorari is appropriate to clarify this relationship between these conflicting, each potentially controlling authorities.

The 9th Circuit did not circumvent the "ZSD" doctrine, nor did this Panel reject considerations regarding the increasing number of civilian workers at defense bases around the world. These factors have changed dramatically since the time of the hearing and no evidence was put on regarding the increasing number of claims. The issue is not appropriately placed into consideration at this time, except perhaps for the Court's continuing duty to clarify standards especially when the standard is usually applied in the first instance to an injured workers at the time they are most in need of clarity in the legal standard.

The reference to the "judicially created" ZSD doctrine implies an accusation of an activist court. The employer focuses on the parameters of circumstantial events and employee actions which impose DBA liability. DBA coverage arises out of the employer-employee relationship and the liability arises from the legal obligations the U. S.

government places on these DBA employers. The DBA Workers' Compensation coverage is thought of as around-the-clock coverage for individuals who work in extraordinary situations where there is restraint on normal personal freedoms of movement and exposure to intensely dangerous situations while these workers are living abroad for the benefit of our country.

This claimant was abandoned in the hospital without resources because of the vagueness of the ZSD doctrine in the case law and Justice Frankfurter's reference to the concept of "frolic on their own" as a possible basis for exclusion from coverage. O'Leary, 340 U.S. at 507. When you have a DBA situation, it is common that disputes arise regarding "off-duty activities" resulting in injury to a claimant. We need to have a rule that reduces litigation because the parties understand the law and can behave accordingly. This problem of DBA coverage is affecting hundreds of injured or deceased American heroes of the war on terrorism. The Supreme Court should deny Certiorari because the ALJ reached the correct decision on coverage in this case.

The workers need to know clearly what is covered and not covered under the ZSD doctrine, and the workers need to know whether military standards of conduct apply to them. The fact that the ALJ interpreted the ZSD doctrine in our favor in this matter does not mean that future ALJs will do the same. This presents a problem for current DBA employees who may find themselves abandoned by their employers in some foreign location, i.e., Iraq, Afghanistan.

Claimant acknowledges that his behavior in the Tiki Bar that night could be characterized as "frolicsome ". But Claimant disputes the contention that his engaging in

recreation is of no benefit to his employer. The employer benefits from having a refreshed entertained and relaxed employee to work under uniquely dangerous and anxiety-producing situations such as those presented on JA.

Employer's second question raises the specter of the Claimant "knowingly and voluntarily participating" in conduct prohibited for other purposes on the base. The employer tries to raise the magnitude of the "military order permanently barring the employee from the locale" to a level equivalent to 100% contributory negligence per se. The Petitioner then adds the phrase "and from further private government contract work." Claimant is not prohibited from working in other DBA situations and performing further private government DBA contract work. Claimant is disabled and therefore cannot perform this work but had he been physically rehabilitated, he would be allowed to go back to work in a DBA situation, though not on JA.

IV. REFLECTIONS ON THE EMPLOYER'S STATEMENT OF THE CASE

The employer rests their Petition for Writ of Certiorari on the dissent of Justice Harlan in O'Keefe v. Smith Associates, 380 U.S. 359, 369 (1965) as an attempt to solidify the exclusion of "frolics" from DBA coverage. Frolic is variously defined as: 1) merry play; gay prank; gaiety; fun; 2) a merry making or party; 3) to gambol merrily; to play in a frisky, light-spirited manner; have fun; play merry pranks; 4) archaic: gay, merry, full of fun - See, The Random House Dictionary of the English Language, The Unabridged Edition, 1966. The term "frolic" does not belong in the legal standard applied to ZSD in 2004. Petitioner raises the possibility that the frolicsome actions being specifically prohibited by the military authority should

result in compulsory debarment from the location should be a "per se" bar to recovery in a Workers' Compensation situation under the DBA.

The ALJ heard the testimony, including that from the newly appointed Installation Commander, Colonel Thomas, who did not even bother to contact claimant or speak with claimant regarding the incident or his investigation. Col. Thomas did check with his claimant's employer's supervisor, who was concerned with the fact that the Kalama Services already had a claim for Claimant's knee replacement, and now they have a claim for his hip replacement. Only debarring one individual in this altercation is not consistent with the way these matters had been handled in the past. This calls into question the due process rights of the Claimant in the military proceeding that resulted in the Military Order, which deprived the Claimant of his employment rights and Workers' Compensation benefits.

While it is true that the Commander has complete and final authority on standards of conduct imposed on military and civilian personnel, he does not have jurisdiction in determining a recovery in a DBA Workers' Compensation claim. There is no evidence in the record that any "due process" was afforded to this civilian United States citizen in the military proceeding resulting in his removal from the island and the loss of his valuable job-related rights. All we know is that claimant was contacted in the hospital after the debarment decision was made, and told by his employer that claimant would not be allowed to return to JA.

While gambling and physical altercation may be strictly prohibited under the base policy, it appears that it was a moderately tolerated behavior in bar situations in the

social clubs on the island according to the bartenders and other people who testified.

There actually is no evidence that any gambling occurred in our case other than in Claimant's response to MP Burum's statement that he could place his foot over Claimant's head in which Claimant says words to the effect of "I'll bet you can't." The ALJ who heard testimony did not find that the prohibited activities of physical altercation had occurred and rendered no opinion on whether or not the frolicsome behavior Claimant engaged in actually constituted "gambling".

What is not before the court today is whether or not the ALJ's resolution of the conflicting accounts in the finding that Claimant is credible and the witnesses, MPs Burum and Sanchez, were found to be less credible. Is this finding of credibility subject to review at this point in this proceeding? This finding was upheld by the BRB and the 9th Circuit Court of Appeals and should not easily subject to reversal in the Supreme Court. It is not a question of whether any judge or the judges on the Supreme Court might have reached a different conclusion about the credibility of witnesses. It is only a matter of was there sufficient evidence in the record to sustain what the ALJ found. The testimony about the various bars on JA supported this finding coupled with the testimony about life in general on JA. Petitioner does not actually argue that there was not a ZSD , only that it should not apply because they equate frolicsome with altercation, and because Col. Thomas debarred the Claimant from JA after the incident.

The ALJ characterized the event as a test of physical prowess and made no finding that some sort of "altercation" had occurred. It is a stretch for the Petitioner to say that

claimant engaged himself in the physical challenge when all he did was stand there and when Burum was unable to put his foot over his head, turned around to walk away and said , "That's it, I'm out of here." The ALJ made no finding that there was a fight. He made a specific finding that there was no hostility in the events leading up to the injury. Col. Thomas' decision happened only days after the event while the claimant was in the hospital and unable to present evidence about the situation on his own behalf. Petitioner's Brief at p. 5.

Petitioner argues that the effect of the Claimant's misrepresentation of the circumstances leading up to his injury to the initial police officer who came in to investigate the injury should be a denial of his claim. Veracity of the claimant was thoroughly delved into by the ALJ in this hearing. The police officer Schmidt-Smith testified by deposition. The ALJ questioned the claimant himself and decided that even though he told Patrolman Schmidt-Smith that he fell walking back from a pool game that the claimant was being truthful when he testified to the ALJ.

The continued references to "absolute liability" is an attempt to arouse sympathetic interest from members of the court who might be concerned about the protection of vulnerable civilian military DBA contractors who need protection from conniving injured workers who are being protected by a circumventive 9th Circuit Court of Appeals. Claimant drank Black Russians and White Russians, and we can assume that there was vodka in those drinks. That may be the only "Absolute" in this case.

Practitioners of DBA cases and employees who work in the DBA system understand that these workers have something near to 24 hours, 7-day a week coverage. If that

is not true, a grant of Certiorari would be appropriate. There are exceptions to this extensive scope of coverage under the DBA. The limits to those exceptions are naturally defined by the cases in which coverage was not found. The guiding light of No-Coverage cases was a claimant who was engaging in autoerotic asphyxiation which is a type of masturbation usually done standing on a ladder with a noose around a person's neck. It is particularly dangerous and results in numerous deaths worldwide each year. Does the high numbers of deaths tend to make it foreseeable recreation?

The finding of no DBA coverage in that case was because the record lacked evidence bearing on the Claimant's motivation for engaging in the activity as well as that the circumstances surrounding the death did not suggest that the death was work-related. Gillespie v. General Electric Company, 21 BRBS 56, 58 (1988). This implies that Gillespie, *supra,* might have been decided differently by the BRB if a better record had been made to the ALJ supporting the ZSD because the loneliness and lack of sexual outlets available to the Claimant because of his job

With Supreme Court Rule 24(g) in mind, I say in abbreviated form that one would assume under the current standard that normal sexual activity would be covered under the Act. There is evidence that individuals participate in sexual activity with varying degrees of frequency and on the theory that healthy sex is good for work productivity. Would a death from heart failure during normal sexual activity to a DBA worker be covered under the Act pursuant to the ZSD? There are numerous other potentially damaging recreational experiences of a sexual and non-sexual nature that an employee might be engaging in from time to time in a DBA situation and each poses a potentially

novel question of coverage under the ZSD with our current "frolic" standard. Where is the limit of covered behavior under the current frolicsome standard? To the injured claimant, or the widowed beneficiary, a clear standard matters because it leads to efficient determinations of coverage and reduced litigation. Claimant's counsel who only gets paid after the final appeal is finished would like to know within reason which cases have merit and are likely to be found to be covered under the ZSD.

This is a case in which an individual walks into a bar, orders a couple of drinks, and tries to start a pool game with two relatively uninterested individuals. This is not the type of behavior that should be so difficult to determine whether or not it is covered under the ZSD. Going into the bar was obviously not a prohibited activity. Claimant was never off the job site as the entire island is regulated, controlled and supervised by his employer as well as the military commander. There was no finding that the claimant was engaged in an "altercation." The main buzzwords that Petitioner is using to try to get this Court to review this case are "absolute liability"; "injured off duty"; "drinking and socializing in a local bar"; "engaging in conduct expressly prohibited by the military command"; "gambling"; and "involvement in a physical altercation". When it comes down to it, the worst the Petitioner can say about Claimant was that his actions were "frolicsome" and therein lies the rub. I remember when the word gay meant happy and frolicsome meant great fun. How does anyone know what type of behavior will exclude a claimant from coverage under the DBA?

What is uniquely similar in both of the actions that Claimant is accused of engaging in resulting in his disbarment is that both gambling and altercations are just not

something that can usually be done alone. You cannot really bet by yourself, though the internet may be changing this. Certainly you can bet against yourself, like in life insurance. If one stood in front of a mirror and made a bet against one's self, would it qualify as gambling for a denial of DBA coverage because it is a prohibited activity?

Col. Thomas' finding of the physical altercation was not consistent with the findings of the ALJ in our case. If the military investigation and order is controlling authority in this DBA/LHWCA case, then a grant of Certiorari would be appropriate to clarify the misunderstanding of the ALJ, BRB, 9th Circuit and counsel for the Respondent. The Military Order merely means Claimant cannot go back to JA. It should be of no other relevance to this appeal.

Petitioner claims the employee in this case "admitted his knowledge of these rules, as well as his knowing and voluntary violation of them." Claimant admitted sensitivity to a potential accusation that his behavior could be construed as a violation of the base rules. That is the reason Claimant gave to the ALJ to account for what he told to police officer Schmidt-Smith. The ALJ found that it was not prohibited to go into the bar, to drink at the bar, to play pool at the bar, and that karate is taught on the island. There is significant evidence in the record about the employer's recreational facilities and opportunities that they provide to their DBA workers to get them to go work in this extraordinary foreign location.

The 9th Circuit Court of Appeals found that the BRB did not err in ruling that this situation arose out of the ZSD and that that doctrine applied in this case. The Panel understood the situation on JA and cited to Farrell v. United States, 313 F.3d 1214 (9th Cir. 2002) for facts regarding the

history of JA. Circuit Judge Silverman wrote the Farrell, *supra,* opinion and our opinion. The 9th Circuit reviewed the accounts that the ALJ found to be credible and that the BRB had similarly upheld when they addressed the question of the different accounts given by the two non-believed witnesses. The Circuit Court did not comment on the BRB's upholding that even if the ALJ had found the two MPs' accounts to be more credible, that fact alone would not have changed coverage under the DBA.

Petitioner should have to accomplish two levels of challenge to the findings below to get the Supreme Court to consider that it may be reasonable to review this case. First, the Court would have to find that the ALJ abused his discretion in believing the claimant, instead of believing the two MPs. Then the Court would have to find that even if the MPs were telling the truth that such behavior would exclude claimant from a recovery under the DBA because of the Military Order. Appellate courts are not supposed to substitute their judgment for those individuals that actually had an opportunity to weigh the evidence. Even if the credibility determination had come out in the other direction, claimant should still have a valid Workers' Compensation claim under the DBA. If he had been charging at the MPs because he wanted to show off his own physical prowess, there still would be coverage. How about a fall while walking back from the pool table after drinking those "absolute" vodka White and Black Russians. That may be excluded only if there was a finding that intoxication was the sole cause of the worker's injury. 33 U.S.C. §903(c).

The testimony was that the claimant showed his medical card that tells airport security screeners about his metal knee replacement to these two MPs while he was buying them drinks. Claimant was marveling about the fact

that he was not totally disabled. This is hardly an individual who is going out and starting a fight as this case is portrayed by Petitioner. All Claimant did was foolishly try to see if this braggart MP really could perform this karate kick with the physical prowess he claimed to possess. What we have here is a brute with a gun who beat an old cripple by probably kicking him when his back was turned and then threatening to kill him if he told anyone about it. That was moments before Claimant told Patrolman Schmidt-Smith that he fell walking back from the pool table. There was testimony that only the MPs have weapons on JA. This case is hardly standing on a ladder with a noose around your neck endangering your own life while masturbating. Going into a bar and wanting to play a game of pool is just not that morally reprehensible except in the town of River City, Iowa in the Meredith Wilson play, "THE MUSIC MAN"; in the Song: "We've Got Trouble" -

> "That's trouble with a "T" and it rhymes with "P", and that stands for Pool and Pool is Trouble for River City."

The 9th Circuit Court applied the proper standard of "substantial evidence to support the factual determinations." There was no substitution of judgment or engaging in a de novo review of the evidence. Appellate courts usually must accept the ALJ's findings of fact "unless they are contrary to the law, irrational, or unsupported by substantial evidence." That is not the problem that the employer is addressing in their Petition for Writ of Certiorari. It is not contrary to law that a worker in a DBA situation would have coverage during normal recreation on their off hours. It is not irrational for the ALJ to award Workers' Compensation even if claimant had engaged in activities which resulted in disbarment from JA because of a Military Order. The

ALJ's decision is supported by substantial evidence in terms of the testimony of all the key witnesses in this case. The testimony was thoroughly and sufficiently reviewed by the ALJ in reaching his opinion.

The 9th Circuit addresses the employer's contention that the claimant's own misconduct caused him to be barred from JA. Appen. A-7a. While this is possibly important to questions like suitable, alternative employment, an important concept under the DBA, the Circuit Court found that the Claimant's own misconduct did not relieve the employer of other obligations under the Act such as to make compensation payments and provide medical care. The failure of the employer to provide the "relevant labor market survey" was not appealed and was not the case before the ALJ or the BRB. That question was not properly raised before the 9th Circuit Court of Appeals.

The 9th Circuit Court analyzed all of the relevant ZSD cases prior to their application of the ZSD to the facts presented in our case. The Court of Appeals listed the findings that make a reversal of the ALJ's conclusions not likely in this case.

The ALJ found that:

1. Employees residing on JA have limited recreational activities, and the military expressly authorizes social clubs/bars on the island.

2. The presence of social clubs/bars serving alcohol to employees who experience lengthy periods of isolation on the atoll creates a foreseeable risk that horseplay

might take place from time to time.

3. Claimant was injured during a brief "one-sided scuffle" in which MP Burum was the aggressor.

4. Claimant participated in the demonstration believing that he would not be hurt either because MP Burum would accomplish what he had promised or because claimant would block the kick.

The Court of Appeals correctly concluded that the BRB committed no error of law and properly held that the ALJ's factual findings were supported by substantial evidence. Appen. A-11a.

The Court of Appeals agreed that under the circumstances of JA, horseplay of the type that occurred in this case is a foreseeable incident of one's employment on JA, citing O'Keefe, 380 U.S. at 363. Seeking recreation under exacting and unconventional conditions is the kind of case to which the ZSD uniquely applies.

The 9th Circuit rejected the employee misconduct assertions of the employer finding that the law is that employee misconduct is, in general, not material in Workers' Compensation law unless it "takes the form of deviation from the course of employment." 2 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, Sec. 32.00 (2000). Appen. A-12a. Neither the ALJ nor the BRB found that this case was one that involves a "deviation"from the course of employment.

The employer cited below Brooks v. Director, Office of Workers' Compensation Programs, 2 F.3d 64, 65 (4th Cir. 1993). Even though our claimant was discharged as the result of his alleged misconduct, the Brooks, *supra,* case did not establish a rule barring all disability benefits in cases where a claimant is discharged for misconduct. The Court of Appeals read Brooks, *supra,* to stand for a much narrower proposition that a claimant's post-injury job, from which he was later fired for cause, may satisfy an employer's burden to show suitable alternative employment. In our case, claimant's later conduct is never called into question as he was never able to return to his job. He never worked again for Kalama or anyone after he was injured. Appen. A-14a.

CONCLUSION

In the final analysis, as much as I would like to argue in person to this Court that the karate demonstration was not like autoerotic asphyxiation even though they both have a flair for the dramatic. It would take an extraordinary trier of facts to find that the claimant's activities in the Tiki Bar that night on JA were excluded from coverage under the DBA. I therefore am requesting that this Honorable Court deny the Petitioner's Request for a Writ of Certiorari to the 9th Circuit Court of Appeals in this case.

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(4)

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No. 03-1440

In the Supreme Court of the United States

KALAMA SERVICES, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951), an employee's injury is covered by the Defense Base Act, 42 U.S.C. 1651 *et seq.*, if "the 'obligations or conditions' of employment create [a] 'zone of special danger' out of which the injury arose." The questions presented are:

1. Whether injuries to an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a zone of special danger created by the isolation of the island and the limited recreational opportunities available there.

2. Whether any misconduct by the employee during the horseplay was sufficiently egregious to sever the relationship between his employment and the injury under the zone of special danger doctrine.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 354 F.3d 1085. The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 15a-30a) is reported at 36 Ben. Rev. Bd. Serv. (MB) 78. The decision and order of the administrative law judge (ALJ) (Pet. App. 31a-53a) is reported at 35 Ben. Rev. Bd. Serv. (MB) 627.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2004. The petition for a writ of certiorari was filed on April 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Base Act, 42 U.S.C. 1651 *et seq.*, subjects covered employments to provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, which provide compensation and medical benefits to employees and their survivors for disability or death resulting from a covered injury. 33 U.S.C. 903(a), 907, 908, 909. Under the LHWCA, the definition of "injury" includes "accidental injury or death arising out of and in the course of employment." 33 U.S.C. 902(2).

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), this Court held that the "arising out of and in the course of employment" standard

> is not confined by common-law conceptions of scope of employment. * * * The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. * * * Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.

Id. at 506-507 (citations omitted); see *Gondeck* v. *Pan Am. World Airways, Inc.*, 382 U.S. 25, 27 (1965) (applying the *O'Leary* standard); *O'Keeffe* v. *Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359, 362-364 (1965) (same).

2. Petitioner Kalama Services, Inc., is a Defense Base Act contractor providing operational services on Johnston Atoll, an island in the Pacific Ocean that is two miles long, one-half mile wide, and 700 miles from Hawaii. Pet. App. 2a, 16a n.1, 34a, 41a. Petitioner Ace U.S.A. insures Kalama. Pet. 3. In August 1996,

Kalama hired respondent Michael Ilaszczat to manage a store on the island. Pet. App. 2a, 34a.

On July 24, 1999, Ilaszczat finished work and went to an authorized social club on the island, where he had two drinks and played pool. Pet. App. 3a, 16a-17a, 36a-37a. When the club closed at about 12:30 a.m., Ilaszczat went to another social club on the island, where he had two more drinks and then approached a group of soldiers and bought them drinks. *Id.* at 3a, 17a, 37a. Later, he entered into a $100 wager with one of the soldiers to see if the soldier, in a karate demonstration, could put his leg over Ilaszczat's head without touching him. *Id.* at 3a-4a, 17a, 38a. When the soldier tried to do so, Ilaszczat saw that the soldier's leg would not clear his head, blocked the kick, and said, "No, that's it. Bull****." *Id.* at 4a, 17a, 38a. Ilaszczat picked up his drink to walk away, then found himself on the ground with his left hip broken. *Ibid.*[1]

Several days later, while recovering from hip surgery, Ilaszczat received a notice from the military commander of Johnston Atoll that he was expelled from the island and prohibited from returning because of the July 25, 1999 "physical altercation." Pet. App. 5a, 17a-18a, 39a. On August 5, 1999, petitioner Kalama Services terminated Ilaszczat's employment based on this debarment order. *Id.* at 5a, 18a. Ilaszczat subsequently filed a claim for compensation under the Defense Base Act. *Ibid.*

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[1] The ALJ heard conflicting accounts of the incident, and found Ilaszczat's version of the events—that he was injured when one of the soldiers swept his legs out from under him, causing him to fall to the ground—to be more credible. Two of the soldiers claimed that Ilaszczat charged at them, lost his balance, and fell. Pet. App. 39a. The ALJ found that this version of events was not supported by the evidence. *Ibid.*

3. An administrative law judge (ALJ) awarded compensation to Ilaszczat under the Act. Pet. App. 31a-53a. The ALJ reasoned that, under the zone of special danger doctrine, Ilaszczat could establish that his injury arose out of and in the course of his employment if "the 'obligations or conditions' of [that] employment create[d] the 'zone of special danger' out of which the injury arose." *Id.* at 42a (quoting *O'Leary*, 340 U.S. at 507). Ilaszczat established an employment-related zone of special danger, the ALJ reasoned, because it was clearly foreseeable that the existence of social clubs serving alcohol to employees isolated for lengthy periods on an island in the middle of the Pacific Ocean, with limited choices and opportunities for recreation, would result in risky horseplay or scuffles from time to time. *Id.* at 44a-45a. Accordingly, an injury resulting from horseplay in such a setting was compensable.

The ALJ recognized that an employee's conduct might be "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment." Pet. App. 45a (quoting *O'Leary*, 340 U.S. at 507). However, the ALJ found that Ilaszczat's conduct was not so egregious that it severed the relationship between his employment and his injury. *Id.* at 46a. Ilaszczat participated in the "demonstration" thinking he would not get hurt. *Id.* at 45a. And, the ALJ reasoned that even if Ilaszczat's injury involved unauthorized conduct, such conduct would still give rise to a compensable injury if, as here, it was foreseeable. *Id.* at 45a-46a.[2]

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[2] The ALJ also found that Ilaszczat's injury was not caused solely by his own intoxication so as to disqualify him from benefits

4. The Benefits Review Board affirmed. Pet. App. 15a-30a. The Board noted that under the zone of special danger doctrine, there must exist a special set of circumstances that increases the risk of physical injury or disability to a putative claimant. *Id.* at 20a-21a. The Board found substantial evidence to support the ALJ's findings of such special circumstances here based on "the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol." *Id.* at 24a.

The Board rejected petitioners' reliance on Board cases where no zone of special danger existed. Pet. App. 24a-26a. The Board also rejected petitioners' argument that benefits should be denied on the ground that the claimant engaged in misconduct that resulted in his debarment from the island and loss of his job. *Id.* at 27a-30a.

5. The court of appeals affirmed. Pet. App. 1a-14a. The court held that under the zone of special danger doctrine, injuries resulting from reasonable and foreseeable recreational activities in isolated or dangerous locales are compensable under the Defense Base Act, while injuries resulting from recreational activities that are neither reasonable nor foreseeable are generally not compensable. *Id.* at 9a. The court concluded that the Board properly affirmed the ALJ's decision because "horseplay of the type that occurred here" is a foreseeable incident of employment on a "small, remote island—only two miles long and one-half mile wide—which offers residents few recreational opportunities." *Id.* at 11a.

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under 33 U.S.C. 903(c). Pet. App. 43a-44a. Petitioners do not challenge that finding. *Id.* at 11a n.3, 44a n.6.

The court rejected petitioners' argument that Ilaszczat's claim should be barred because he engaged in misconduct. Pet. App. 12a-14a. Misconduct is generally not material unless it "takes the form of deviation from the course of employment." *Id.* at 12a (quoting 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 32.00 (2000)). The court concluded that petitioners had not established such a deviation in this case. *Id.* at 12a-14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue that the court of appeals has circumvented the zone of special danger doctrine and imposed absolute liability on Defense Base Act employers for injuries that occur at distant, isolated locations. Pet. 2, 6. That assertion is incorrect. The court of appeals specifically recognized that injuries resulting from recreational activities in isolated or dangerous locales would not be compensable when the activities are unreasonable and unforeseeable. Pet. App. 9a. That interpretation of the zone of special danger doctrine is consistent with decisions of this Court, which have allowed compensation for recreational activities that are reasonable and foreseeable. For example in *Gondeck* v. *Pan America World Airways, Inc.*, 382 U.S. 25, 26 (1965), this Court held that a death that occurred in a jeep accident when an employee was returning from "reasonable recreation" after work on San Salvador Island was compensable. Similarly, in *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359, 359-360, 364 (1965), the Court held that a drowning

death that occurred during a Saturday recreational outing at a lake 30 miles from the employee's job site in South Korea was compensable. And in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 505-507 (1951), the Court found compensable a death that occurred while an employee was trying to rescue a swimmer in a dangerous channel near a recreation facility in Guam. In each of these cases, as here, the injury occurred while an employee, stationed in a remote location, was engaging in foreseeable recreational activity after normal working hours.

There is also no merit to petitioners' argument that no court of appeals has recognized limits on the zone of special danger doctrine. Pet. 9. Two courts of appeals, by affirming Board decisions denying compensation, have recognized limits in cases where the injury was neither reasonable nor foreseeable. See *Kirkland* v. *Air Am., Inc.*, 23 Ben. Rev. Bd. Serv. (MB) 348 (1990) (no compensation to widow of employee who was murdered during a home burglary in Laos where the wife participated in the burglary), aff'd *sub nom. Kirkland* v. *Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991) (Table); *Gillespie* v. *General Elec. Co.*, 21 Ben. Rev. Bd. Serv. (MB) 56 (1988) (no compensation to widow of employee who died in Germany while engaged in autoerotic activity), aff'd, 873 F.2d 1433 (1st Cir. 1989) (Table)).

2. Petitioners further argue that review is warranted so that the Court can set forth the parameters of the zone of special danger doctrine as applied to Defense Base Act contractors and employees who are subject to rules of conduct set by a military commander. Pet. 10. Petitioners assert that the court below failed to consider the role of such rules in this case. Pet. 10-11.

The court of appeals correctly considered the relevance of these rules, however, in holding that employee misconduct is generally not material unless it "takes the form of deviation from the course of employment." Pet. App. 12a (quoting 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 32.00 (2000)). Whether misconduct amounts to such a deviation is generally a question of fact for the ALJ, which must be upheld if supported by substantial evidence. See, *e.g.*, *O'Leary*, 340 U.S. at 508 (a finding that death was fairly attributable to the risk of employment was supported by substantial evidence and therefore would not be disturbed). Petitioners simply disagree with the ALJ's finding that Ilaszczat's conduct was not so egregious that it severed the relationship between his employment and his injury. See Pet. App. 44a. Review of that factbound issue is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KALAMA SERVICES, INC. and ACE U.S.A. INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, and MICHAEL ILASZCAT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY TO BRIEFS IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points raised in the Briefs in Opposition filed by Respondent, Michael Ilaszczat, and the Federal Respondent, Solicitor of Labor.

I. This Matter Presents the Compelling Opportunity for the Supreme Court to Set Forth Clear Limits to the Zone of Special Danger Doctrine Which Has Heretofore Been Applied to Impose Strict Liability Against the Employer and Carrier in Defense Base Act Matters.

The Solicitor is incorrect in asserting that limits to the zone of special danger doctrine have been established in Circuit Court precedent. To the contrary, the Ninth Circuit Court's ruling in this matter exemplifies that the coverage and scope of the zone of special danger doctrine has been greatly expanded to include the personal "frolics" of Defense Base Act ("DBA") employees which Justice Frankfurter expressly identified as being beyond the coverage of the DBA. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951). Rather, the Circuit Court cases cited to by the Solicitor as establishing the "limits" of the zone of special danger doctrine provide a compelling reason for the Supreme Court to address this issue.

The Solicitor cites a case from the D.C. Circuit involving a widow who sought DBA benefits after having participated in the murder of her husband, *Kirkland v. Air Am., Inc.*, 23 Ben. Rev. Bd. Serv. 348 (1990), *review denied*, *Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991) (Table), and a case from the First Circuit involving an employee who asphyxiated himself while masturbating in a closet, *Gillespie v. General Elec. Co.*, 21 Ben. Rev. Bd. Serv. 56 (1988), *aff'd*, 873 F.2d 1433 (1st Cir.

1989) (Table) as Circuit Court cases which have "recognized limits of the zone of special danger doctrine." (Fed'l Res. at 7).

The *Kirkland* or *Gillespie* matters do not set forth the "recognized limits" of the D.C. or First Circuit Court of Appeals, respectively, because in both cases the court merely affirmed the lower court's denial of benefits without opinion. These matters cannot reflect what Judge Frankfurter considered the controlling boundaries when the zone of special danger doctrine was established by the Supreme Court considering the extremes of conduct involved in these matters.

In *Kirkland*, the widow sought DBA benefits after she willfully participated in the felony which lead to her husband's death. The widow in Kirkland, whom the decedent had met and married while working in Vietiane, Laos for Air America: participated in a plot along with her boyfriend and another man to rob her husband; drugged her husband on the night of the felony with insecticides, arsenic, atrophine, and valium which were placed in a drink which the widow prepared for her husband; agreed to be tied up and gagged while the robbery was taking place to disguise her participation; and was charged with murder and burglary and jailed by the Vietiane policy for nine months and was later freed on bail and never tried by the new communist government in Laos. Under these circumstances, the Administrative Law Judge found that the widow's "participation in the murder of her husband effectively severed any causal relationship which may have existed between the conditions created by his job and his death." *Kirkland v. Air Amer. Inc.*, 23 Ben. Rev. Bd. Serv. at 348-49. In so ruling, the Administrative Law Judge held that the judicial maxim that a wrongdoer should not be allowed to benefit from her wrongdoing applied squarely to the widow's claim for DBA benefits since she willfully participated in a felony which lead

to her husband's murder. *Id.* at 350. The Administrative Law Judge found support for his holding under Section 3(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(c), which excludes injuries which arose from the intent of the employee to injure himself or another. *Id.* at 350-51.

Thus, under *Kirkland*, the "recognized limits" to the zone of special danger doctrine referred to by the Solicitor involve a widow's intentional participation in a felony which leads to the death of her husband/employee and then seeks dependency death benefits under the DBA. It is respectfully submitted that these are no "limits" at all.

In *Gillespie*, the widow sought DBA benefits 21 years after her husband died when he accidentally hung himself in his closet while trying to temporarily asphyxiate himself during autoerotic sexual activity while he was stationed at the Ramstein Air Force Base in West Germany. The Administrative Law Judge held that the employee's "separation from his spouse and family with the attendant loneliness" established the zone of special danger which was created by the conditions of his employment and awarded the widow DBA benefits. *Gillespie v. General Elec. Co.*, 21 Ben. Rev. Bd. Serv. at 57-58 The Benefits Review Board held that, as a matter of law, "this is such a case" in which the employee's course of conduct might go so far from his employment and service to his employee that it would be unreasonable to find that the injuries suffered arose in the course of employment. *Id.* at 472.

Similar to *Kirkland*, *Gillespie* cannot serious be considered a case which sets forth the "recognized limits" of the zone of special danger doctrine. Both of these cases present mutually unique and extraordinary factual circumstances not in any way presenting guidance of any kind to the administrative process

and the courts as to the application of the zone of special danger doctrine. As stated in the Petition, the Circuit Courts have failed to advise of any limits thereby, de jure, diminishing the Supreme Court doctrine. With the exponential increase in DBA matters due to the Government's military involvement in Iraq and Afghanistan, United Nations peacekeeping efforts in Bosnia and around the world, and government service projects worldwide this matter presents the clear and beneficial opportunity for the Supreme Court to address and set forth clear limits to the zone of special danger doctrine within those intended by Justice Frankfurter.

II. The Ninth Circuit Court of Appeals Imposed Strict Liability In Determining Coverage Under the Zone of Special Danger Doctrine.

The Solicitor erroneously asserts that the Ninth Circuit Court of Appeals properly applied the reasonably foreseeable standard, as set forth in *O'Leary*, in determining coverage of this incident under the zone of special danger doctrine. Neither the cases nor factual findings cited to by the Solicitor on this issue are supportive of the Solicitor's position.

A comparison of the cases cited to by the Solicitor on this issue and the incident in which Ilaszczat was injured supports that the Ninth Circuit applied strict liability in this matter and not a reasonably foreseeable standard. In particular, the cases cited to at pages 6-7 of the Solicitor's brief present the situation in which an employee was injured in an activity which was a reasonably foreseeable risk of working in the foreign employment locale. *See, e.g., Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (Employee was killed in a motor vehicle accident while returning to base from a nearby town); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*,

380 U.S. 359 (1965) (employee was injured while on a recreational outing during his employment in South Korea); *O'Leary v. Brown-Pacific-Maxon, Inc.*, supra (employee drowned while attempting, along with 20 other people, to rescue a swimmer from a dangerous waterway near the employer's facility in Guam while returning from the employer provided recreation center).

Ilaszczat's claim brings within the zone of special danger doctrine an entirely different category of incidents which by application eliminate any limits to the zone of special danger doctrine to impose strict liability upon the Employer and Carrier. Ilaszczat was injured when he bet an MP $100 that the MP was not fast enough to kick him in the head. Ilaszczat's conduct was strictly prohibited by the Military and resulted in his permanent debarment from the Johnston Atoll. In that regard, it is impossible to reconcile Ilaszczat's claim and those of *Gondeck*, *O'Keefe*, and *O'Leary*, within the same legal principal.

The factual findings by Judge Kaplan which the Solicitor cited to further establish that the zone of special danger doctrine was circumvented in this matter. At page four of its Brief, the Solicitor cited to Judge Kaplan's finding that Ilaszczat's injury fell within the zone of special danger doctrine because it was "reasonably foreseeable" that employees would participate in the type of frolic involved in this incident due to the existence of social clubs and isolation on the Johnston Atoll and that, even if the conduct was unauthorized, it was still compensable because it was "reasonably foreseeable." (Fed'l Res. at 4).

It is a finding without support that it is reasonably foreseeable that one patron at a bar will bet another patron $100 that the second patron cannot kick the first patron in the head. Slipping on liquid while playing pool is reasonably foreseeable.

The type of conduct in which Ilaszczat was involved in this matter is not, under any circumstances, reasonably foreseeable.

The Solicitor also cited to the Judge Kaplan's finding that Ilaszczat participated in this karate challenge thinking that he would not get hurt, (Fed'l Res. at 4), *i.e.* he did not intend to get injured. What the Solicitor and lower courts ignored was that where Ilaszczat and the MP involved in this contest bet $100.00, they both intended to succeed. That is, Ilaszczat did not intend to get kicked in the head by the MP and the MP intended to kick Ilaszczat in the head. The mere description of this incident supports that the imposition of DBA liability upon the Employer and Carrier is absurd. Further, consideration of whether Ilaszczat thought or intended that an injury would arise from the activity at issue is not the legal boundary which Justice Frankfurter set for the zone of special danger doctrine.

III. The Ninth Circuit Court of Appeals Failed to Consider In Any Respect The Importance and Relevance of The Military's Code of Conduct and the Injured Worker's Debarment From the Work Site For Having Acted in Clear Violation Thereof.

Strikingly absent from the Ninth Circuit Court's opinion and the Briefs in Opposition was any reasonable legal basis for ignoring the impact of the code of conduct established by the Military commanders on the Johnston Atoll. All employees and employers on the Johnston Atoll were obligated, under sanction of debarment, removal from the atoll and recision of the contract, to act in strict accord with the military's rules of conduct. Consequently, violations of such rules, as Ilaszczat's, are relevant to the assessment of limits of the zone of special danger doctrine. The Ninth Circuit's failure to address the military's rules of conduct represents its failure to properly assess parameters of the zone of special danger doctrine.

The Solicitor misconstrues the second issue raised in the Petition for Writ of Certiorari concerning the impact and parameters of the zone of special danger doctrine where the standards of conduct in the employment locale are established by Military command as necessary for completion of the military mission. Contrary to the solicitor's argument, this is not an issue of whether the employee's conduct was egregious as both egregious and reasonable conduct can run a foul of rules of discipline established at a military base. Nor is this an issue of whether the employee deviated from the course of employment because the zone of special danger doctrine only applies to off-duty activity generally not considered to be within the course of employment. Fed'l Resp. at 7-8. The issue is whether and to what extent Military standards of conduct critical to completion of military mission are applied to the zone of special danger doctrine.

Administrative Law Judge Kaplan found that the zone of special danger completely supplants military governance in the employment locale. In particular, Judge Kaplan found it irrelevant whether Ilaszczat's actions where prohibited by the military so long as they were foreseeable, Pet. App. at 45a-46a., a legal position which the Ninth Circuit affirmed. *Id.* at 28a. In so doing, the lower courts ignored entirely the acknowledgment in *O'Keefe*, 380 U.S. at 364, that whether the employee was engaged in prohibited behavior when injured is relevant to determining coverage under the zone of special danger doctrine.

In this error of ever increasing involvement by private employment in all aspects of military operations, this case presents a compelling opportunity for the Supreme Court to establish parameters of the zone of special danger doctrine where standards of conduct in the employment locale are established by military command as critical for completion of the military

mission. Certainly, it cannot be as the lower courts in this matter found that clearly established military standards of conduct of which all employees are aware are irrelevant of determining coverage under the zone of special danger doctrine. Thus, it is critical that the Supreme Court address this issue by granting Certiorari.

IV. The Claimant's Bar Supports the Petitioner's Prayer for the Supreme Court to Consider this Matter.

The Respondent, Michael Ilaszczat, agrees that review of this matter by the Supreme Court is necessary to address the limits of the zone of special danger doctrine and the relationship of Military command orders upon DBA coverage. (Res. at 9). In particular, Ilaszczat indicates that, as the zone of special danger doctrine is judicial created, granting certiorari benefits DBA workers, employers, and carriers in determining coverage "during their off-clock time." (Res. at 9). Ilaszczat asserts that he was abandoned by the Employer and Carrier while the dispute between the parties over coverage was litigated and is concerned that workers must "fend for themselves because their employer is testing a vague area of the law." (Res. at 9). Ilaszczat requests that the Supreme Court set forth a clearer statement of the reach of the zone of special danger doctrine to facilitate a reduction in litigation regarding DBA coverage of "hundreds of injured or deceased American heroes of the war on terrorism.". (Res. at 12).

While the Petitioner disputes that Ilaszczat was abandoned or that he is comparable to an American hero, Ilaszczat raises the important and compelling issue that employees who are injured while working oversees in Iraq, Afghanistan, or other fronts in the war against terrorism, may find themselves in a particularly dangerous circumstance should an issue arise as to

whether the cause of their injury fell outside the zone of special danger doctrine. At the same time, the Petitioner asserts that Employees, Employers, and Carriers, need to know in advance what conduct will and will not fall within the zone of special danger doctrine. This will assist Employees in advance because they may be less likely to engage in questionable conduct if they are aware that coverage under the DBA is not provided 24 hours per day, 7 days per week on a strict liability basis. An Employer and Carrier also needs to have a clear understanding of the scope of the zone of special danger doctrine to facilitate work place rules of conduct, coordinate off-hour conduct of its employees with the military command, and protect their employees from engaging in conduct for which DBA coverage is not provided.

Thus, consideration of this case as a matter for public policy will serve the compelling purpose of assisting Employees, Employers, and Carriers engaged in ever expanding war against terrorism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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